THE INTRODUCTION OF PAY-TV IN CANADA

ISSUES AND IMPLICATIONS

Edited by R. Brian Woodrow and Kenneth B. Woodside

The Institute/L’Institut
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Foreword

Broadcasting in Canada, like the weather, provides unending possibilities for discussion and argument. We have rarely been for long without some aspect of it under scrutiny, debate, and contention. It is not surprising that this should be so. With a climate that forces Canadians to find much of their entertainment at home for a good part of the year, with radio and television as the primary sources, and with the immensity of our geography occupied by so scattered a population, the importance of broadcasting and the problems that attend it are of a scale that most countries cannot know. Nor do others have the overwhelming presence of the United States, with its programmes available in virtually every living room, in the same language, and with all its personalities known better than our own. Pay-TV presents the latest array of questions to ensure that the broadcasting debate can bubble as merrily as before.

As this collection of essays makes clear, there is some difference of view as to whether pay-TV should be regarded as the latest "crisis" in broadcasting or rather as the first "crisis" of the "Information Society" into which we are told we are moving, with great consequences for us and our way of life. Whichever it is, and it may well be both, there is no doubt about the complexity of the problems it raises. The CRTC decision of 18 March 1982 has dealt with some of the problems, but it is only the first move in grappling with something new, the full import of which can only be dimly seen and conjectured at this stage. The essays are designed to present the views of a variety of authors who have followed this development and are competent to comment on it. The Institute believes they will throw light on the problems and help in the resolution of them.

Gordon Robertson
President
October 1982

Avant-propos

Au Canada, la radiodiffusion, tout comme le temps, est une source intarissable de discussions et de disputes. Rares ont été les moments où un de ses aspects n'a pas été l'objet d'un examen, d'un débat ou d'un différend. Il n'est pas surprenant qu'il en soit ainsi. Avec un climat qui oblige le Canadien à se divertir, pendant une bonne partie de l'année, à la maison surtout et grâce avant tout à la radio et à la télévision, et compte tenu du territoire immense et d'une population clairsemée, la radiodiffusion et ses problèmes prennent une ampleur rarement égalée ailleurs. Les autres pays ne vivent pas non plus au côté de ce voisin envahissant que sont les États-Unis, qui diffuse ses émissions dans presque chaque maison, dans la même langue, et dont les vedettes sont mieux connues que les nôtres. La télévision payante constitue le dernier sujet qui permettra au débat sur la radiodiffusion de continuer de plus belle.

Comme le démontre ce recueil de textes, les opinions diffèrent quant à savoir si la télévision payante représente la dernière « crise » de la radiodiffusion ou plutôt la première « crise » de la « société d'information » vers laquelle on nous dit que nous nous acheminons, et dont les conséquences seront d'envergure pour nous et notre mode de vie. Quoi qu'il en soit, et les deux parties ont peut-être raison, la complexité des problèmes ne fait pas de doute. La décision du CRTC du 18 mars 1982 a réglé certains des problèmes, mais il ne s'agit que d'une première tentative d'aborder une situation nouvelle dont la portée entière ne peut être que distinguée vaguement à cette étape. Les essais cherchent à présenter les points de vue d'une variété d'auteurs qui ont suivi cette évolution et sont à même de la commenter. L'Institut croit qu'ils éclaireront les problèmes et aideront à les résoudre.

Gordon Robertson
Président
Octobre 1982

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We would like to thank our contributors both for the high quality of their work and for their patience in awaiting the publication of this volume. As we have found out, the trials and tribulations of putting together an edited collection are many, but hopefully the product will be useful.

We would also like to thank Dr. William Stanbury of the Institute for his advice and support throughout the project and commend Ann McCoomb for her thorough and careful editorial job. As well, the secretarial work of Jean Edmiston, Lorraine Black, and Susan Sommerauer was indispensable and greatly appreciated.

The Authors

Jeffrey I. Bernstein is an associate professor in the Economics Department at Carleton University and specializes in industrial organization and regulation.

John B. Black is the associate librarian in the library at the University of Guelph. His research interest involves the policy implications of new communications technologies.

Stanley Feldman has recently completed an LLM thesis, "Introduction to Paid Television in Canada," at the University of Toronto.

Kristin Booth Glen is a judge of the Civil Court, City of New York and was formerly associate professor of law at the New York Law School and the Hofstra University School of Law.

Steven Globerman is an associate professor in the Faculty of Business Administration at Simon Fraser University and specializes in industrial organization and public policy.

Robert J. Goldberger is a graduate student in the Faculty of Management at McGill University.

Hudson Janisch is a professor in the Faculty of Law at the University of Toronto, where he teaches communications and administrative law.

The Honourable David MacDonald was formerly Minister of Communications and Fellow in Residence at The Institute for Research on Public Policy.

Frank W. Peers is a professor of political science at the University of Toronto and has written extensively on the development of Canadian broadcasting.

Fred Rumsey was formally a senior policy adviser in the federal government and worked as a research associate with David MacDonald at The Institute for Research on Public Policy.

R. Brian Woodrow is an assistant professor in the Department of Political Studies at the University of Guelph and specializes in public policy including the areas of communications and the environment.

Kenneth B. Woodside is an assistant professor in the Department of Political Studies at the University of Guelph and specializes in taxation and communications policy.

Pay-TV in Canada: An Overview of Issues and Implications

The introduction of pay-TV in Canada is just around the corner! Proposals for its introduction on a nation-wide basis date back to the early 1970s, and the subject has attracted increasing media coverage and considerable political activity over the years. The cable industry in Canada has pressed hard for pay-TV right from the beginning and, more recently, a variety of other groups — public and private broadcasters, common carriers, provincial governments, and the domestic programme production industry, among others — have entered the fray. Since 1976, the federal government has been on record in favour of the introduction of pay-TV in Canada, and now the CRTC has finally made its decision as to who will be allowed to provide the service, what form it will take, and on what terms and conditions. After a decade of debate and deliberation, Canada's first pay-TV services are expected to be on the air in the spring of 1983.

This collection of commissioned essays was conceived and begun in 1980 at a time when support for the introduction of pay-TV was beginning to gain momentum. Its purpose is to shed light on the introduction of pay-TV in Canada, the many important issues that it raises, and the broader implications that it has for Canadian society. Experts from several social science disciplines — political science, economics, law — were asked to examine particular aspects of the introduction of pay-TV in Canada. Individual contributors have often taken the opportunity to advance their own considered views as to how the introduction of pay-TV should be handled which, taken as a whole, represent pretty well the spectrum of opinion and comment on the matter. All of the essays (with the exception of this summary) were completed prior to the recent CRTC decision, but the issues that they raise are as valid and worthy of consideration in the wake of that decision as before it. It is thus as a guide to the issues and implications raised by the introduction of pay-TV in Canada and a modest contribution to that ongoing debate that this book has been conceived and executed.

What's at Stake?

The initial question that must be asked is: so what? What is so significant about the introduction of pay-TV in Canada? Despite its seeming simplicity, there are no easy or definite answers to this question, and even a tentative response must be sensitive to different levels of meaning. On the most elementary level, pay-TV represents little more than the addition of a new service to the existing broadcasting system, providing recently released movies, entertainment, and sports specials to serve a supposedly receptive mass audience. As such, pay-TV would represent yet another phase in the evolution of conventional broadcasting and would have to be integrated into the existing broadcasting system so as not to challenge its historic principles or be too disruptive of the *status quo*. However, unlike conventional broadcasting, pay-TV would operate as a discretionary, premium service whether distributed over the air or by cable/satellite linkage and holds the potential over the longer term to offer an expanding range of more and more specialized programming to an increasingly fragmented audience. Along with non-broadcast services and other related technology like Telidon, pay-TV presages fundamental changes in our whole communications system that will allow greater consumer choice on a user-pay basis while undermining the traditional arguments for government regulation. Reformulating that initial question in more sophisticated form, then, does the introduction of pay-TV in Canada constitute the "fourth crisis" of Canadian broadcasting, as some have characterized it, or is it not really the first crisis of the "Information Society"?

Our contributors are very clearly divided on this important question. Drawing explicitly upon Graham Spry's characterization of pay-TV as "the fourth crisis" of broadcasting, Frank Peers — perhaps the foremost authority on Canadian broadcasting history — treats the issue very definitely as an extension of the existing broadcasting system. He reviews the historical evolution of Canadian broadcasting — from radio to television to cable and now to pay — and makes the case that the introduction of pay-TV in Canada should proceed within our public broadcasting tradition and should be consciously designed to serve important national objectives. Other contributors also treat pay-TV very much as an extension of the existing broadcasting system. For example, the Honourable David MacDonald — himself a former federal Secretary of State and Minister of Communications — along with his co-author Fred Rumsey examine the regional and cultural implications of pay-TV and tie its introduction to what they propose as a Canadian public's "Charter of Television Rights." Likewise, Kris Glen — a lawyer by training and an informed observer of the American experience — argues forcefully that pay-TV is pre-eminently a broadcasting issue and points to the way in which pay-TV in its several forms has brought about changes — and not always changes for the better — in American broadcasting during the 1960s and 1970s.

The other conceptualization of pay-TV as a new information technology rather than merely an extension of the existing broadcasting system also receives attention. Professors John B. Black, Brian Woodrow, and Kenneth Woodside draw upon some of the more recent writing on communications technology to argue that the introduction of pay-TV might alternatively be viewed as being the first crisis of the "Information Society." Technologists like Gordon Thompson, Douglas Parkhill, and Israel Switzer see pay-TV as potentially quite different from conventional broadcasting and tend to view it more in relation to other "information technology" like Telidon. Such "information technology" has quite different characteristics that should be taken into account in any decision on the introduction of pay-TV in Canada. The essay by Hudson Janisch and Stan Feldman, while approaching the subject from a legal rather than a technological standpoint and focusing specifically on jurisdictional and regulatory matters, argues strenuously that pay-TV should be treated on its own merit and not merely as a means to achieve other, often confused ends and is particularly critical of the undue delay encountered in introducing this promising new technology. The two contributions from economists — Steven Globerman who examines the introduction of pay-TV from a welfare economics perspective and Jeffrey Bernstein and Robert Goldberger who attempt to characterize the likely structure of any emergent pay-TV industry in Canada — also tend to view pay-TV more as a new information technology to be exploited and less as a mere extension of the broadcasting system.

What underlies this somewhat esoteric difference of opinion is one's basic conceptualization of the pay-TV issue in Canada. Should pay-TV be treated exclusively as a matter of cultural regulation or also in terms of industrial strategy? To date, the overwhelming tendency has been to treat the introduction of pay-TV in Canada almost exclusively as a matter of cultural regulation. As mandated under the Broadcasting Act and expressed in somewhat varied fashion by the CRTC, successive federal ministers, and many other commentators, the crucial point at issue is as follows:

> How can pay-TV be introduced in Canada in such a way as to create a distinct and substantially Canadian service and stimulate the domestic programme production industry while not unduly disrupting the existing broadcasting system?

For those who see the introduction of pay-TV in Canada more in terms of industrial strategy, the crucial point at issue is quite different.

> How can government afford not to introduce pay-TV in Canada as one of several prospective services that could expand the market and improve the competitive position of existing firms within the communications industry and, both in terms of hardware and software, encourage the creation of a new, high-technology information industry?

Thus, the cable companies, programme producers, provincial politicians, and others who promote pay-TV have quite a different view of what is at stake.

Pay-TV as a Case Study in Regulatory Decision Making

Beyond these disagreements, however, there is widespread consensus among contributors that the introduction of pay-TV in Canada offers a fascinating — and sometimes disconcerting — case study of regulatory decision making at work. Regulation is such a pervasive feature of public policy making in Canada that its particular characteristics subtly influence both the context within which an issue like pay-TV is treated and the process whereby it is resolved. As Professor Peers suggests, the pay-TV decision is only the most recent of a series of crucial decisions that have shaped public policy over the years. The regulatory content of public policy in this area is high, ranging from the original decision to mandate the existence of a public broadcasting entity to restricted competition in the provision of radio and television programming and to Canadian content regulation itself. The current debate over the introduction of pay-TV in Canada is little different, although the lexicon of regulation may be more specific. Protection against American cultural domination, the dangers of "siphoning" and "fragmentation" of the viewing audience, the intense struggle between potential winners and losers, the choice between monopoly and competition in the provision of service, the likely pricing and entry conditions imposed upon any emergent pay-TV industry, the determination of benefits to be provided for the Canadian production industry among others, are all tell-tale evidence of regulatory decision making at work.

Not only is the content of the pay-TV issue in Canada pervasively regulatory, but the actual process whereby that issue is being decided is also thoroughly regulatory. Woodrow and Woodside, in their essay on the pay-TV decision and how it was arrived at during the 1970s and early 1980s, focus on the continuing efforts of promoters, especially the cable companies, to pressure the federal government and the CRTC to introduce pay-TV in Canada and the delay and difficulties occasioned by regulatory decision making in a cabinet/parliamentary and federal system. The essay points to the many subtle pressures against innovation that exist within an established regulatory situation. It documents the persistent attempts on the part of the major cable operators to mobilize support for the introduction of pay-TV in Canada and the determined efforts of a wide range of opponents — broadcasters, common carriers, some programme producers, various public interest groups, and so on — to counter this initiative. It presents the different views and jockeying for position and influence on the part of federal departments and agencies interested in the pay-TV decision and the emerging competition between federal and provincial governments seeking to control its introduction. Perhaps most strikingly, it captures the particularly uncomfortable position of the CRTC in deciding upon the introduction of pay-TV in Canada — pressured from both sides by articulate spokesmen and forceful arguments, caught up against its will in the conflict within and between governments, weighing a variety of complex technical and policy considerations in the design of its eventual decision, and seemingly not fully convinced about the ultimate desirability and utility of the initiative.

Several other contributions to the book also focus on pay-TV as a case study in regulatory decision making and express concerns about some of the weaknesses and deficiencies revealed by the process. Hudson Janisch and Stan Feldman, for example, are critical of the extent to which pay-TV has come to be defined almost unconsciously in regulatory terms as well as what they regard as manifest shortcomings in the regulatory process itself. In a fundamental sense, they seriously question whether government should be able to control the introduction of a new technology like pay-TV and whether the point at issue is not ultimately one of human rights and individual freedom. As well, they are particularly upset about the way in which the CRTC has made policy in an area such as Canadian content, in seeming disregard for the expressed wishes of the majority of the viewing audience and through procedures that do not adequately protect the legal rights of those with a legitimate interest in its decisions. On the other hand, reflecting upon the American experience where thoroughgoing deregulation and more formalized procedural safeguards are at work, Glen points to the disorder created by an "open skies" policy as well as some of the excesses of American regulatory procedure and cautions Canadians against too quick and ill-considered a decision to take pay-TV out of the regulatory context. Lastly, on one important point there is general agreement among all contributors, namely that specifically Canadian conditions — cultural, industrial, or whatever — may well make regulation uniquely appropriate and justifiable and, thus, the actual exercise of regulatory decision making on an issue like pay-TV even more important to study.

Pay-TV as an Exercise in Applied Policy Analysis

In addition to being a case study in regulatory decision making, the introduction of pay-TV in Canada has also served as an elaborate exercise in policy analysis. This collection of essays highlights a wide range of matters — technical as well as socio-political — that bear upon the proper design of public policy. Policy analysis of varying types and degrees of sophistication underlies virtually all contemporary decision making whether it be manifest in the study and analysis conducted by government departments and agencies, the proposals advanced by individual firms and interested groups, or the commentary made by experts and outside observers. Viewed from this perspective, the pay-TV issue is very much a battleground of ideas about whether and how the service should be introduced in Canada and where applied policy analysis conducted in various realms constitutes the weapons of combat.

Perhaps the most explicit examples of policy analysis included in this book come from the economists who apply a clear body of theory and strict methodologies to the study of the pay-TV issue. Globerman, treating the issue from a standard welfare economics standpoint, asks whether or not the introduction of pay-TV in Canada can be justified on distributional, efficiency, and fairness grounds. He finds that the distributional consequences of introducing pay-TV are likely to be quite broad in terms of their impact both on production and consumption, that the allocative efficiency of the market-place will be enhanced through availability of the new service, and that arguments based upon fairness advanced by existing broadcasters and the domestic production industry are not particularly persuasive. Bernstein and Goldberger approach the pay-TV issue somewhat differently in terms of the likely structure of any emergent pay-TV industry in Canada. They present different models of industry structure — ranging from the private-sector cartel arrangement espoused by the cable companies to a public-sector monopoly as advanced by the broadcasters to various models of imperfect competition — and argue vigorously for a competitive solution. In particular, they point out the virtues of competition in terms of the advantages of competitive bidding for independent Canadian producers and the probability of excess profits on the part of the operator under monopoly conditions.

These two essays, along with several other contributions to the book, make important points about the design of an appropriate pay-TV decision. First of all, several of the essays touch upon the question of whether or not there is sufficient and effective demand for pay-TV service in Canada. Surveys conducted in recent years continue to indicate relatively low percentages of Canadians who express a willingness to subscribe to pay-TV service. The apparent "success" of pay-TV in the United States is often used to argue in favour of its introduction in Canada, but, as Peers, Woodrow and Woodside, and Glen point out, there are specifically Canadian factors such as the relative maturity of the cable industry and its already high rates of penetration, which mean that pay-TV may not play the same role as it did in the United States. While the major proponents of pay-TV in Canada remain outwardly optimistic and there is no lack of applicants for pay-TV licences, there should be real concern about the possibility of lower-than-expected subscription rates and successive deficits over the early years. Thus, it is very much an open question as to how successful pay-TV may prove to be in Canada — especially in the short-term future.

What technology is most appropriate to the introduction of pay-TV in Canada? As Black *et al.* make clear, cable distribution is clearly the expected method of distribution for pay-TV in Canada, not only because of its proven track record in the United States but also because of the strategic position and ready resources of the Canadian cable industry. Direct broadcast satellites may become a feasible alternative later in the decade, and the increasing popularity of video recordings may pose something of a challenge, but, for all intents and purposes, pay-TV will be primarily associated with the cable industry. Likewise, it is widely accepted that a pay-per-channel format is most likely to be adopted because of its technological simplicity and apparently greater acceptability on the part of both distributor and consumer. More sophisticated pay-per-programme formats are viewed as a second stage in the evolution of pay-TV, while universal subscription is generally rejected as defeating the purpose for which pay-TV was conceived. As the technology and formats for pay-TV in Canada become more elaborate, several contributors point out that the real potential of the new service is increasingly being tapped at the same time that the danger of failure through over-extension becomes greater.

Should pay-TV service be provided under monopoly conditions or on a more competitive basis? There is a vital debate going on concerning this matter and our contributors are very much of different opinions. Proponents of monopoly solutions such as Peers, and MacDonald and Rumsey tend to ground their arguments in the Canadian broadcasting tradition and emphasize the need for a single agency to distribute pay-TV service as a way of ensuring the production and use of the maximum amount of Canadian programming. Proponents of competitive solutions such as Janisch and Feldman, and Bernstein and Goldberger stress the extent to which pay-TV can operate differently than conventional broadcasting and focus on the benefits of competition in terms of consumer choice and varied programming. It is interesting to note that while most of the major proposals for pay-TV service may pay lip-service to competition, there is a general expectation that some type of protected monopoly arrangement may well be the likely outcome.

What is the appropriate configuration among national, regional, and specialized pay-TV service? The original conception of pay-TV in Canada was as a single national service, in English and French, targeted to a mass audience and available across the country through cable distribution. This is certainly the way in which Peers and most other contributors to this book identify the basic conception of the service. More recently, however, that conception has been challenged by demands for regional services operating in particular areas of the country and/or additional national services targeted to specialized audiences. Arguments in favour of such alterations to the basic conception of pay-TV are advanced by MacDonald and Rumsey, and Black *et al.* respectively. In coming to its determination of the appropriate configuration for pay-TV in Canada, the CRTC has had to weigh these alternative conceptions and may opt for a "tiered" service considerably more elaborate than originally anticipated.

Finally, to what extent can any pay-TV service that might be introduced in Canada be made distinctly Canadian? This has been, of course, the perennial question raised about the broadcasting system as a whole and it is a question that has dogged the pay-TV issue from the beginning. It is interesting to note, however, that specific consideration of pay-TV has taken the debate beyond matters of direct regulation into the cross-subsidization game. Several contributors, including Janisch and Feldman, Globerman, and Bernstein and Goldberger, express concern about the effectiveness to date of Canadian content regulation and question the utility of its application to pay-TV. Instead, attention has been directed more and more to various cross-subsidization schemes whereby pay-TV revenues could be diverted into support for the domestic programme production industry. In this way, the pay-TV issue is serving to redefine traditional notions of Canadian content regulation more broadly in terms of some measure of overall commitment to Canadian programming. Each of the questions raised here involves an important point of analysis that bears upon the proper design of public policy with regard to the introduction of pay-TV in Canada, and the essays in this collection are generally representative of the range of opinion that exists on these matters.

Broader Implications of the Pay-TV Decision

As we have noted earlier, the introduction of pay-TV in Canada is a far-reaching decision with implications that go well beyond immediate considerations. It is not simply a matter of determining the winner or winners from among the rather large group of applicants eagerly seeking a pay-TV licence. Nor is it primarily a matter of establishing the most appropriate regulatory framework within which the new service can be introduced. The pay-TV issue in Canada is not merely a technical matter of designing the optimal system, but rather it must be seen as having much broader social, economic, and political implications. For better or worse, the pay-TV decision has come to be associated with several of the more fundamental questions facing Canada in the 1980s.

Interestingly, there is no consensus among our contributors on exactly what are the broader implications of the pay-TV decision. Peers presents the pay-TV issue as primarily a matter of cultural sovereignty and sees the public broadcasting tradition in Canada as our sturdiest defence against the threat of yet another wave of American programming. For their part, MacDonald and Rumsey generally agree with Peers' view but place stronger emphasis on the need to serve regional as well as national purposes in the operation of any pay-TV system. From quite a different viewpoint, Black *et al.* focus on the technological implications of the pay-TV decision and the extent to which this new information technology can be properly exploited and fit into Canada's emerging industrial strategy. On the other hand, Feldman and Janisch treat the issue as a matter of human rights and question the extent to which government should be able to limit individual choice. Clearly, there is no dearth of opinions as to the broader implications of the pay-TV decision.

In the final analysis, any firm determination of the real implications of the introduction of pay-TV in Canada cannot be rendered before the fact. By way of epilogue written after the CRTC brought down its recent licensing decision, however, the co-editors have sought to make a start in that direction. They examine the 18 March decision in detail, focusing on the "internal logic" of the decision itself and the various lines of argument that might be taken in assessing its impact. In particular, they treat the implications of the decision in terms of the infusion of a kind of structured competition into the emerging pay-TV industry, the continued but modified reliance on cultural regulation, and the extent to which the Commission has adequately accommodated rapid technological change in the communications field. In all three areas, the co-editors draw somewhat disturbing conclusions about the introduction of pay-TV in Canada, the validity of which will only become apparent or not in the years to come.

La télévision payante au Canada : un aperçu des problèmes et de leurs implications

L'introduction de la télévision payante au Canada, c'est pour demain! Les projets d'introduction à l'échelle nationale remontent au début des années 1970, et le sujet a fait l'objet de nombreux reportages en plus de susciter une activité politique intense. Dès le commencement, les distributeurs ont exercé de fortes pressions pour obtenir les droits à la télévision payante, et, plus récemment, divers autres groupes — les radiodiffuseurs publics et privés, les radiocommunicateurs, les gouvernements provinciaux et l'industrie canadienne de production d'émissions, entre autres — sont entrés dans la course. Le gouvernement fédéral avait déclaré dès 1976 être en faveur de l'introduction de la télévision payante; le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC) a finalement décidé qui aurait le droit d'assurer le service, sous quelle forme et à quelles conditions. Après dix ans de débats et de discussions, on s'attend que le premier service de télévision payante au Canada entrera en ondes au printemps 1983.

Ce recueil de textes commandés a été conçu et amorcé en 1980 alors que les pressions en faveur de l'introduction de la télévision payante s'intensifiaient. Il cherche à faire la lumière sur l'introduction de la télévision payante au Canada, sur les grandes questions qu'elle soulève, ainsi que sur ses implications pour la société canadienne. On a demandé à des experts de plusieurs disciplines des sciences sociales — sciences politiques, économie, droit — d'examiner différents aspects de l'introduction de la télévision payante au Canada. Les auteurs ont souvent saisi l'occasion pour présenter leurs propres opinions réfléchies sur la façon de traiter l'introduction de la télévision payante : dans l'ensemble, on a obtenu par là un éventail assez représentatif des opinions et des commentaires en la matière. Tous les textes qui suivent (à l'exception du prologue) ont été complétés avant la publication de la décision du CRTC; cependant, les questions qu'ils soulèvent sont tout aussi valables et dignes de considération qu'elles ne l'étaient avant la décision. Ce livre a donc été conçu et publié dans l'intention de servir de guide aux questions et aux implications soulevées par l'introduction de la télévision payante au Canada; il se veut une contribution modeste à ce débat permanent.

L'enjeu

Il faut tout d'abord se demander : puis après? Qu'y a-t-il de si important à propos de l'introduction de la télévision payante au Canada? Malgré son apparente simplicité, il n'existe pas de réponse facile ou définitive à cette question; même une réponse préliminaire doit tenir compte de différents niveaux de signification. Au niveau le plus élémentaire, la télévision payante ne représente que l'ajout de nouveaux services au système actuel de radiodiffusion et vise à fournir des films récents, des émissions de divertissement et des émissions sportives à un public de masse supposément réceptif. En tant que telle, la télévision payante représenterait une autre phase de l'évolution de la radiodiffusion classique et devrait être intégrée au système actuel de radiodiffusion afin de ne pas menacer ses principes historiques ni trop déranger le *statu quo*. Toutefois, à la différence de la radiodiffusion classique, la télévision payante serait exploitée en tant que service facultatif à tarifs, qu'elle soit distribuée sur les ondes ou par l'entremise du réseau câble-satellite; à longue échéance, elle permet la possibilité d'offrir une gamme élargie d'émissions de plus en plus spécialisées à un public de plus en plus fragmenté. De concert avec les services autres que la radiodiffusion ainsi que les autres technologies connexes comme Télidon, la télévision payante présage des changements fondamentaux dans notre système de communication global qui permettront un plus grand choix au consommateur sur la base d'une tarification à l'utilisateur tout en minant les arguments classiques en faveur de la réglementation par le gouvernement. Si l'on reprend notre première question sous une forme un peu plus sophistiquée, on peut donc se demander si l'introduction de la télévision payante au Canada constitue la « quatrième crise » de la radiodiffusion canadienne, comme certains l'ont appelée, ou n'est-ce pas plutôt la première crise de la « société de l'information »?

Nos auteurs sont très distinctement partagés sur cette question importante. S'inspirant explicitement de la qualification, par Graham Spry, de la télévision payante comme « la quatrième crise » de la radiodiffusion, Frank Peers — peut-être la plus grande autorité sur l'histoire de la radiodiffusion canadienne — traite la question comme s'il s'agissait certainement d'une extension du réseau de radiodiffusion actuel. Il repasse l'évolution historique de la radiodiffusion canadienne — de la radio à la télévision au câble à, aujourd'hui, la télévision payante — et soutient que l'introduction de la télévision payante au Canada devrait se faire dans le cadre de notre tradition en matière de radiodiffusion publique et être conçue ouvertement de manière à satisfaire nos importants objectifs nationaux. D'autres auteurs traitent également la télévision payante comme une extension du système actuel de radiodiffusion. Par exemple, l'honorable David MacDonald — lui-même un ancien secrétaire d'État et ministre des

Communications au fédéral — ainsi que son coauteur, Fred Rumsey, étudient les implications régionales et culturelles de la télévision payante et font reposer son introduction sur leur projet d'une « charte des droits du public canadien en matière de télévision ». De même, Kris Glen — un avocat de formation et un observateur informé de l'expérience américaine — soutient avec vigueur que la télévision payante est avant tout une question de radiodiffusion, et indique de quelle façon la télévision payante sous ses multiples manifestations a provoqué des changements — et pas toujours pour le mieux — dans la radiodiffusion américaine au cours des années 1960 et 1970.

L'autre conceptualisation de la télévision payante comme une nouvelle technique d'information plutôt que comme tout simplement une extension du système actuel de radiodiffusion se mérite aussi une certaine attention. Les professeurs John B. Black, Brian Woodrow et Kenneth Woodside s'inspirent de certains des plus récents écrits sur la technologie des communications pour soutenir que l'introduction de la télévision payante pourrait être considérée plutôt comme la première crise de la « société de l'information ». Les technologistes comme Gordon Thompson, Douglas Parkhill et Israel Switzer considèrent la télévision payante comme possiblement très différente de la radiodiffusion classique et ont tendance à la considérer plutôt dans ses rapports avec les autres « techniques d'information » comme Télidon. De telles « techniques d'information » ont des caractéristiques fort différentes dont il faudrait tenir compte dans toute décision sur l'introduction de la télévision payante au Canada. Le texte de Hudson Janisch et Stan Feldman, tout en abordant le sujet d'un point de vue juridique plutôt que technologique et en insistant particulièrement sur les questions de compétence et de réglementation, plaide fortement en faveur du traitement de la télévision payante selon ses propres mérites et non seulement comme un moyen d'en arriver à d'autres fins parfois mal définies; on y critique particulièrement les retards injustifiés qu'a connus l'introduction de cette nouvelle technologie si prometteuse. Les deux articles rédigés par des économistes — Steven Globerman, qui examine l'introduction de la télévision payante du point de vue d'une économie de bien-être, et Jeffrey Bernstein et Robert Goldberger, qui tentent de définir la structure probable de toute nouvelle industrie de la télévision payante au Canada — tendent aussi à voir la télévision payante plutôt comme une nouvelle technologie de l'information à être exploitée et moins comme une simple extension du système de radiodiffusion.

C'est la conceptualisation fondamentale de la question de la télévision payante au Canada qui sous-tend cette différence d'opinions quelque peu ésotérique. Faudrait-il traiter la télévision payante uniquement comme une question de réglementation culturelle ou également comme partie d'une stratégie industrielle? À ce jour, on a eu irrésistiblement tendance à traiter l'introduction de la télévision payante au Canada presque exclusivement comme une question de réglementation culturelle. Telle que définie en vertu de la Loi sur la radiodiffusion et exprimée de façons parfois diverses par le CRTC, par les ministres fédéraux qui se sont succédés et par plusieurs autres commentateurs, la question cruciale est la suivante :

> Comment peut-on introduire la télévision payante au Canada de façon à créer un service distinct et substantiellement canadien et stimuler la production d'émissions au pays tout en ne disloquant pas inutilement le système actuel de radiodiffusion?

Pour ceux qui voient l'introduction de la télévision payante au Canada davantage en termes de stratégie industrielle, la question cruciale est fort différente :

> Comment le gouvernement peut-il se permettre de ne pas introduire la télévision payante au Canada puisqu'il s'agit d'un des nombreux services qui pourraient élargir le marché et améliorer la situation concurrentielle des entreprises existantes au sein de l'industrie des communications et, tant du point de vue du matériel que du logiciel, encourager la création d'une nouvelle industrie de l'information à forte composante technologique?

On voit donc que les télédistributeurs, les producteurs d'émissions, les politiciens provinciaux et les autres qui favorisent la télévision payante expriment des points de vue fort différents sur son enjeu.

La télévision payante comme illustration de la décision en matière de réglementation

On remarque cependant, au-delà de ces désaccords, un consensus global chez les collaborateurs voulant que l'introduction de la télévision payante au Canada soit une occasion fascinante — et parfois déconcertante — d'étudier un cas pratique de décision en matière de réglementation. La réglementation fait tellement partie de l'élaboration de la politique au Canada que ses caractéristiques propres influencent subtilement tant le contexte au sein duquel est traité une question comme la télévision payante que son mode de solution. Comme le laisse entendre le professeur Peers, la décision relative à la télévision payante n'est que la dernière d'une série de décisions capitales qui ont modelé la politique générale au cours des ans. La politique générale en ce domaine manifeste une forte composante de réglementation qui va de la décision originale de créer une société de radiodiffusion publique à la restriction de la concurrence dans l'offre d'émissions de radio et de télévision en passant par la réglementation du contenu canadien elle-même. Le débat actuel au sujet de l'introduction de la télévision payante au Canada est fort semblable bien que le lexique de la réglementation soit peut-être plus précis. La protection contre la domination culturelle américaine, les dangers de « siphonner » ou de « fragmenter » le public, la lutte intense entre les gagnants et les perdants éventuels, le choix entre le monopole et la concurrence dans l'offre du service, les conditions probables d'entrée et de détermination des prix imposées à la nouvelle industrie de la télévision payante et la détermination des avantages dont profitera l'industrie canadienne de la production témoignent, entre autres, du processus de décision en matière de réglementation.

Au Canada, ce n'est pas seulement le contenu de la télévision payante qui se prête à une réglementation globale, mais même le processus par lequel on en arrive à une décision. MM. Woodrow et Woodside, dans leur exposé sur la décision en matière de télévision payante et sur les moyens d'y arriver au cours des années 1970 et au début des années 1980, insistent sur les efforts incessants des promoteurs, et en particulier des télédistributeurs, en vue d'inciter le gouvernement fédéral et le CRTC à introduire la télévision payante au Canada, et sur les difficultés et les délais occasionnés par la décision en matière de réglementation dans un régime parlementaire/cabinet et fédéral. Le texte souligne les nombreuses pressions subtiles qui jouent contre l'innovation dans une situation de réglementation bien établie. Il documente les tentatives renouvelées de la part des plus grands télédistributeurs de mobiliser l'appui en faveur de l'introduction de la télévision payante au Canada et les efforts déterminés de toute une gamme de parties opposées — les radiodiffuseurs, les sociétés exploitantes, certains producteurs d'émissions, divers groupes d'intérêts et ainsi de suite — en vue de contrer cette initiative. On y présente les différents points de vue et les manoeuvres des ministères et des organismes fédéraux intéressés à la décision en matière de télévision payante, et la concurrence qui s'est fait jour entre le gouvernement fédéral et les gouvernements provinciaux au sujet du contrôle de son introduction. Ce qui est peut-être plus étonnant, c'est de voir la situation particulièrement inconfortable du CRTC face à une décision au sujet de l'introduction de la télévision payante au Canada — soumis aux pressions des deux côtés forts d'arguments puissants et de porte-parole éloquents, embrouillé malgré lui dans les conflits au sein des gouvernements et entre eux, sous-pesant une variété de considérations techniques et administratives complexes dans le but d'en venir à sa décision, et apparemment quelque peu incertain du caractère désirable et utile de cette initiative.

Certains autres textes recueillis dans ce volume portent aussi sur la télévision payante en tant qu'étude individuelle de la décision en matière de réglementation et expriment des inquiétudes face à certaines des faiblesses et des déficiences mises à jour par le processus. MM. Janisch et Feldman, par exemple, critiquent la façon dont on en est venu à définir la télévision payante presque inconsciemment en termes de réglementation ainsi que ce qu'ils considèrent comme des insuffisances manifestes du processus de réglementation lui-même. Fondamentalement, ils se demandent sérieusement si le gouvernement devrait pouvoir régir l'introduction d'une nouvelle technologie comme la télévision payante et s'il n'est pas plutôt question, en fin de compte, de droits de la personne et de libertés individuelles. La façon dont le CRTC a élaboré une politique dans un domaine tel que le contenu canadien, faisant apparemment fi des désirs exprimés par la majorité du public et grâce à des procédures qui ne protègent pas suffisamment les droits juridiques de ceux qui ont un intérêt légitime dans ces décisions, les indispose particulièrement. Par contre, commentant l'expérience américaine où une déréglementation globale et des sauvegardes juridiques plus formelles sont la norme, M^{me} Glenn note le désordre créé par une politique du « ciel ouvert » ainsi que certains des excès de la procédure américaine de réglementation, et avertit les Canadiens de ne pas déréglementer la télévision payante de manière trop rapide ou irréfléchie. En dernier lieu, tous les collaborateurs semblent s'entendre sur un point important, notamment que des conditions spécifiquement canadiennes — culturelles, industrielles ou autres — pourraient faire qu'en ce cas la réglementation soit pertinente et justifiable et, de ce fait, donner encore plus d'importance à l'étude du processus réel de la décision en matière de réglementation relativement à une question comme la télévision payante.

La télévision payante comme exercice d'analyse appliquée de la politique

En plus de permettre l'occasion d'une étude individuelle de la décision en matière de réglementation, l'introduction de la télévision payante au Canada a aussi permis une analyse approfondie de la politique. Ce recueil de textes met en relief un grand éventail de questions — aussi bien techniques que sociopolitiques — qui influencent la juste élaboration de la politique générale. Des analyses politiques plus ou moins perfectionnées et sophistiquées sous-tendent à peu près toutes les décisions contemporaines comme on peut en juger par les études et les analyses effectuées par les ministères et les organismes de l'État, par les projets présentés par des entreprises individuelles et des groupes d'intérêts ou par les commentaires des experts et des observateurs de l'extérieur. Dans cette perspective, la question de la télévision payante est effectivement un champ de bataille où les idées sur l'opportunité de l'introduction du service au Canada et la façon de le faire ainsi que l'analyse politique appliquée portant sur divers domaines constituent les armes.

Les exemples les plus frappants d'analyse politique que renferme ce livre viennent peut-être des économistes qui appliquent un vaste ensemble théoriue et une stricte méthodologie à l'étude de la question de la télévision payante. M. Globerman, qui aborde la question du point de vue classique de l'économie de bien-être, se demande si oui ou non l'introduction de la télévision payante au Canada peut être justifiée sur une base de distribution, d'efficacité et d'équité. Il conclut qu'en matière de distribution, les conséquences de l'introduction de la télévision payante risquent d'être fort poussées quant à leur impact tant sur la production que sur la consommation, que l'efficacité du marché en termes de distribution sera améliorée grâce à la disponibilité du nouveau service et que les arguments fondés sur l'équité présentés par les actuels radiodiffuseurs et par l'industrie nationale de production ne sont pas particulièrement convaincants. En ce qui a trait à la structure probable de la nouvelle industrie de la télévision payante au Canada, MM. Bernstein et Goldberger abordent la question de façon quelque peu différente. Ils présentent différents modèles de la structure de l'industrie — allant du cartel privé formé par les télédistributeurs au monopole public prôné par les radiodiffuseurs en passant par différents modèles de concurrence imparfaite — et se prononcent avec force en faveur de la concurrence. Ils soulignent les vertus de la concurrence particulièrement en ce qui a trait aux avantages offerts aux producteurs indépendants canadiens qui pourraient soumissionner dans un climat de concurrence et à la probabilité des profits excessifs réalisés par les sociétés exploitantes sous condition de monopole.

Ces deux textes, ainsi que quelques autres, font valoir des points importants au sujet de la conception d'une décision appropriée sur la télévision payante. Tout d'abord, certains des auteurs abordent la question de savoir s'il y a ou non une demande suffisante en matière de télévision payante au Canada. Les enquêtes effectuées depuis quelques années indiquent toujours que le pourcentage de Canadiens qui souhaitent s'abonner à un service de télévision payante demeure relativement bas. On invoque souvent le « succès » apparent de la télévision payante aux États-Unis pour soutenir le bien-fondé de son introduction au Canada, mais, comme le soulignent MM. Peers, Woodrow et Woodside, et M^{me} Glen, il faut tenir compte de certains facteurs spécifiques au Canada, tels que la maturité relative de l'industrie du câble et son fort taux de pénétration, qui empêcheront la télévision payante de jouer le même rôle ici qu'aux États-Unis. Bien que les principaux partisans de la télévision payante au Canada demeurent manifestement optimistes et qu'on ne manque pas de requérants pour des permis de télévision payante, on devrait se préoccuper de la possibilité de taux d'abonnement plus faibles que prévus et d'une accumulation de déficits au cours des ans. Il est donc tout à fait légitime de se demander quel sera le succès de la télévision payante au Canada — particulièrement à court terme.

Quelle est la technologie qui soit la mieux adaptée à l'introduction de la télévision payante au Canada? Comme l'indiquent clairement MM. Black *et al.*, la télédistribution est de toute évidence la méthode prévue de diffusion de la télévision payante au Canada, non seulement parce qu'elle a fait ses preuves aux États-Unis, mais aussi en raison de la situation stratégique et des ressources de l'industrie canadienne de la télédistribution. D'ici quelques années, il pourra être possible de diffuser directement à partir des satellites, et la popularité croissante des enregistrements vidéo pourrait modifier quelque peu l'enjeu, mais, à toutes fins utiles, la télévision payante sera avant tout associée à l'industrie de la télédistribution. De même, on accepte généralement que l'on adoptera une formule du tarif par canal en raison de sa simplicité technologique et apparemment de sa meilleure acceptabilité de la part tant du distributeur que du consommateur. On considère comme une deuxième étape de l'évolution de la télévison payante une formule plus perfectionnée de tarification au programme, tandis que l'on rejette actuellement la formule d'abonnement universel qui irait à l'encontre de la raison d'être de la télévision payante. À mesure que s'accroîtront les possibilités de la télévision payante au Canada en matière de technologie et de format, certains des auteurs indiquent que les vraies possibilités de ce nouveau service seront de plus en plus mises en valeur en même temps que les dangers d'échec provoqués par des engagements excessifs s'accroîtront.

Devrait-on offrir le service de télévision payante sous condition de monopole ou sur une base plus concurrentielle? Un débat d'importance capitale fait rage sur cette question, et nos collaborateurs ont des opinions fort partagées. Les partisans du monopole, tels que M. Peers et MM. MacDonald et Rumsey, appuient leurs arguments sur la tradition canadienne de la radiodiffusion, et font valoir le besoin d'un organisme unique pour distribuer le service de télévision payante afin d'assurer la production et l'utilisation d'une quantité maximale d'émissions canadiennes. Les partisans des solutions concurrentielles comme MM. Janisch et Feldman, et MM. Bernstein et Goldberger insistent sur la différence de fonctionnement d'un service de télévision payante par rapport à la radiodiffusion classique, et mettent en relief les avantages de la concurrence en termes de choix du consommateur et de variété de programmation. Il est intéressant de noter que, même si la plupart des principaux projets de télévision payante prônent la concurrence du bout des lèvres, on s'attend généralement qu'on en arrive ultimement à un certain type de monopole protégé.

Quel est le rapport à adopter entre des services de télévision payante national, régional et spécialisé? Au départ, on voyait la télévision payante au Canada comme un unique service national, en anglais et en français, destiné à un public de masse et disponible partout au pays grâce à la télédistribution. C'est certainement là la façon dont M. Peers et la plupart des autres collaborateurs à ce livre identifient la conception de base du service. Plus récemment, toutefois, les demandes de services régionaux fonctionnant dans certaines régions du pays et de services nationaux supplémentaires destinés à des auditoires spécialisés sont venus remettre en question cette conception. MM. MacDonald et Rumsey ainsi que MM. Black *et al.* présentent respectivement des arguments en faveur de telles modifications de la conception fondamentale de la télévision payante. En modelant le visage de la télévision payante au Canada, le CRTC a dû peser toutes ces conceptions différentes et pourrait bien opter pour un service à plusieurs niveaux considérablement plus élaboré que tout d'abord prévu.

En dernier lieu, comment peut-on faire d'un service de télévision payante qui pourrait être introduit au Canada un service distinctement canadien? Voilà évidemment la question éternelle que l'on a soulevée au sujet du système de radiodiffusion dans son ensemble et qui se pose depuis les tout débuts au sujet de la télévision payante. Il est intéressant de remarquer, cependant, que les particularités de la télévision payante ont porté le débat au-delà des questions de réglementation directe vers le jeu des subventions compensatoires. Quelques collaborateurs, y compris MM. Janisch et Feldman, M. Globerman ainsi que MM. Bernstein et Goldberger expriment leurs inquiétudes face à l'efficacité de la réglementation sur le contenu canadien à ce jour et se posent des questions sur l'utilité de son application à la télévision payante. On s'est plutôt intéressé de plus en plus aux divers modes de subvention compensatoire grâce auxquels les revenus de la télévision payante pourraient être réorientés vers un appui à l'industrie nationale de la production d'émissions. Par ce biais, la question de la télévision payante sert à redéfinir les notions traditionnelles de la réglementation du contenu canadien en les élargissant de manière à inclure un certain engagement global envers la programmation canadienne. Chacune des questions soulevées ici comporte un important élément d'analyse ayant rapport à une élaboration pertinente d'une politique générale face à l'introduction de la télévision payante au Canada; les textes de ce recueil sont, en règle générale, représentatifs de la gamme d'opinions qui existent sur ces questions.

Les implications générales de la décision relative à la télévision payante

Comme nous l'avons déjà noté, l'introduction de la télévision payante au Canada constitue une décision de grande portée dont les implications dépassent de loin les considérations à court terme. Il ne s'agit pas simplement de choisir un ou des gagnants parmi le nombre assez imposant de requérants qui désirent ardemment obtenir un permis d'exploitation de télévision payante. Il ne s'agit pas non plus avant tout de créer le cadre de réglementation le plus approprié pour l'introduction du nouveau service. Il ne faut pas voir la question de la télévision payante tout simplement comme une question technique, soit la conception du système optimal, mais plutôt comme une question ayant de vastes répercussions sociales, économiques et politiques. Pour le meilleur ou pour le pire, on en est venu à associer la décision sur la télévision payante à plusieurs des questions fondamentales auxquelles doit répondre le Canada au cours des années 1980.

Fait intéressant, nos collaborateurs ne s'entendent pas sur ce que sont exactement ces implications plus vastes de la décision en matière de télévision payante. Le professeur Peers présente la question de la télévision payante avant tout comme une question de souveraineté culturelle, et considère la tradition de radiodiffusion publique au Canada comme notre meilleure défense contre la menace d'une autre vague de programmation américaine. Pour leur part, MM. MacDonald et Rumsey abondent généralement dans le même sens que M. Peers, mais insistent davantage sur le besoin de répondre tant aux objectifs régionaux que nationaux dans l'exploitation de tout système de télévision payante. Adoptant un point de vue fort différent, MM. Black *et al.* insistent sur les implications technologiques de la décision en matière de télévision payante et sur la mesure dans laquelle cette nouvelle technologie d'information peut être exploitée convenablement et s'inscrire dans la stratégie industrielle canadienne en devenir. Par ailleurs, MM. Feldman et Janisch traitent surtout de la question des droits de la personne et se demandent dans quelle mesure le gouvernement devrait être capable de limiter les choix individuels. On ne manque évidemment pas d'opinions sur les implications globales de la décision relative à la télévision payante.

En dernière analyse, il est impossible de vraiment anticiper les implications de l'introduction de la télévision payante au Canada. Toutefois, en guise d'épilogue, rédigé après la récente décision du CRTC, les coéditeurs ont voulu ouvrir la voie. Ils examinent en profondeur la décision du 18 mars en insistant sur la « logique interne » de la décision et sur les diverses argumentations qui pourraient servir à évaluer ses effets. Ils traitent particulièrement des implications de la décision pour la mise en place d'un type de structure de la concurrence au sein de la nouvelle industrie de la télévision payante, de la place permanente, quoique modifiée, de la réglementation culturelle et du succès obtenu par le CRTC dans son effort d'adaptation au progrès rapide de la technologie des communications. Dans ces trois domaines, les coéditeurs tirent des conclusions quelque peu inquiétantes face à l'introduction de la télévision payante au Canada; seul le temps nous en démontrera le bien-fondé ou non.

The Place of Pay-TV in the Canadian Broadcasting System

1

by
Frank W. Peers

Objectives for Canadian Broadcasting

Speaking to a convocation at York University in 1976, Graham Spry, one of the creators of a distinctive Canadian broadcasting system, identified pay-TV as bringing the "fourth crisis in Canadian broadcasting," the first three having arisen from the development successively of radio, television, and cable transmission. He went on to say, "The fourth crisis and phase in Canadian broadcasting is rushing pell-mell upon the Canadian people and once again we know too little of what it means."[1] We have had five years to ponder the questions Spry raised and to consider how pay-TV may be incorporated into the broadcasting system without scuttling our past achievements. Little consensus has emerged. In part the Canadian uncertainty arises from too little consideration given to the objectives we set for ourselves and the difficulties we found in achieving them at other stages in broadcasting development — radio first, then television, then cable.

The newer technologies in communication tend to bewilder us through the accelerated pace of their development: satellite and cable, fibre optics, videodisc and videotape. Aided and abetted by computer technology, they may indeed be giving rise to a new industrial society: what the Clyne Committee sees as "an event equal in importance to the Industrial Revolution of the 19th century."[2] The changes that broadcasting experiences will be not only in the forms of transmission but in the organizational structures that support programming, the size and variety of audiences, the attention the public pays to the messages transmitted, and effects for the individual and for society generally. Despite the shifts in delivery methods and support structures, the reasons we value broadcasting and the objectives we pursue in ordering the broadcasting system need not change. Our purposes in authorizing and facilitating electronic methods of mass communication should continue to reflect basic values that we have identified over the years. We have little reason to institute new forms of transmission or delivery (such as pay-TV) in ways that will transgress or nullify the continuing communications objectives that have stood the test of time. Since it is in our interest to choose a form of pay-TV consonant with our best traditions, we must review the broadcasting choices previously made to determine how an *added* television service can be introduced without sacrificing our past achievements. If we make the right choices, we may even enhance the ability of our present broadcasting system to fulfil the objectives set for it, though this cannot be guaranteed.

Past Experience, Present Prospects

Radio

In the first ten years of broadcasting, radio in Canada developed without conscious thought as to the pattern such development should take. The result by 1930 was a scattering of private stations affording inadequate coverage for the country's population, transmitting an ever-increasing proportion of American programme material. Inquiries found no possibility that national networks could originate and carry Canadian programmes without public support or subsidy. Between 1930 and 1932, the Canadian Radio League (now called the Canadian Broadcasting League) woke the public to the need for a new national policy in broadcasting, and spurred the government to action that alone could save Canadian programming from extinction. Then as now, the economics of broadcasting left untrammelled would dictate that Canadians should become the passive consumers of programmes produced in another country to meet the interests of another people. Then as now, many would argue plausibly that new technologies made such a development inevitable and that Canadians, recognizing the facts of life, should concentrate their efforts on distributing the foreign product, picking up such profits as might accrue to the canny middleman-distributor. This, in fact, has been the pattern that Canada accepted in feature film entertainment.

The young Canadians who formed the Canadian Radio League in 1930 — Graham Spry, Alan Plaunt, Brooke Claxton, and others — declared that such a subservient posture was not good enough. They wanted programming that would serve Canadian needs and that would reflect this country. They demanded programmes in English and French to be made accessible to all Canadians. They wanted programmes of a diverse nature that would appeal to a variety of tastes to meet needs that were national and regional and local. They wanted programmes that would stimulate and inform as well as entertain. Taking their cue from a two-year-old report of the Aird Commission, members of the Radio League insisted on a publicly owned company to undertake the production of Canadian programmes and to guarantee their distribution through national networks. The campaign initiated by the League culminated in the creation of the Canadian Broadcasting Corporation (CBC), a production and distribution agency whose mandate is set out by statute — and the body that to this day originates by far the largest part of Canadian television production.[3]

The Radio League diverged from the recommendations of the Aird Commission in asking for the continuation of private broadcasting to supplement the programmes of the public agency and especially to meet local or community needs. The League cautioned, however, that the public and private elements should be bound together in a single broadcasting system, and that both parts should be required to carry out the objectives set out by Parliament. The League insisted that the public component must be predominant; otherwise, the economic advantages to stations distributing essentially an American programme product would be so great that the system would be subverted from serving Canadian ends.

Through legislation in 1932 and 1936, the Canadian Parliament did establish a national agency to produce and distribute Canadian programmes, operating in co-operation with privately owned radio stations. Not all objectives were realized. American programmes still tended to be placed in prime time on the national networks, principally because they attracted advertisers, and Canadian governments were never willing to provide funds sufficient to support a fully non-commercial service. Inevitably there were tensions between the statutory corporation, the CBC, and the private stations now asked to recognize national obligations. Nevertheless, the Massey Commission and successive parliamentary committees judged that on the whole the system was working, and that Canada had successfully built a service in English and French that responded to its interests and needs.

Television

After the Second World War, television offered an even more powerful means of communication than radio and represented a prize that a number of interests hoped to capture. Owners of private stations in the metropolitan areas urged that television should be developed completely by private capital. American networks thought they might enter into partnership with local entrepreneurs and draw on the production resources associated with their networks in the United States. Advertisers were eager to take advantage of the new medium and were generally inclined to support private ownership and control.

After some delay and uncertainty, the Canadian government decided to opt for a pattern in television similar to that in radio: a mixed system, with the key stations of the networks publicly owned, but with privately owned affiliates. From 1952 until 1960, the CBC continued to be the predominant partner, producing most of the Canadian-originated programmes, and serving as the main channel for importing and distributing American commercial programmes on the network it controlled. Television coverage was extended rapidly, again in English and in French, and affiliated private stations seemed content with the arrangement instituted in 1952. That situation changed with the need to provide an alternative Canadian service after 1959, and especially with the creation in 1958 of a new regulatory authority, the Board of Broadcast Governors (BBG).

The removal of regulatory authority from the CBC in 1958 resulted from a promise of the Diefenbaker government to establish a greater degree of equity between the public and private components in the system. Under the 1958 Broadcasting Act, the CBC would remain as the operator of stations and networks but would not have the exclusive responsibility of running national networks. Together with the private stations, it would be subject to the regulatory authority of the BBG. Previously, the CBC's network package had been the chief guarantee that Canadian programming would be available to Canadians wherever they lived. Under the new dispensation, regulation was intended to achieve this goal, particularly on private television networks such as CTV, or on unaffiliated private stations. In spite of the BBG's effort in regulation, the pressures to increase returns on private investment in television, and the competition between the two English networks (CBC and CTV) led to a decreased share of audience watching Canadian rather than American programmes.[4] In the mid-1960s, American programmes were made even more accessible through their dissemination on cable, and once again a public inquiry, the Fowler Committee, judged the time ripe for a changed broadcasting structure to reassert Canadian objectives and values.

From 1960 until 1968, the year when it was superseded by the Canadian Radio and Television Commission (CRTC) as the regulatory authority, the BBG indeed attempted to enforce a general regulation setting a Canadian content requirement at 55 per cent for all television stations. But the pressures on the BBG to relax this rule led to so many modifications and so much latitude in interpretation that the Canadian content provision itself lost credibility. This was not the only way the BBG could intercede. There was also its function in choosing among the competing applicants for television licences. In its attempt to ensure that the broadcasting system provide, in the words of the 1958 act, "a varied and comprehensive broadcasting service of a high standard that is basically Canadian in content and character," the BBG chose from the applicants at various locations those who put forward the most ambitious programme plans, those who made the most attractive promises. However, once licensed, the new stations showed little interest in fulfilling their promises of performance — or if in some cases their interest was genuine, they lacked sufficient financial resources. Politically, it proved impossible to withdraw or suspend the licences once issued. The television services the private stations provided in each community were too popular for licence cancellation to be a realistic option. Despite their poor record in meeting the performance expectations of the regulatory board, the new "second stations" had quickly been turned into profitable enterprises.[5]

Enter Cable

By the mid-1960s, television stations were worried by the rapid development of cable — a means of bringing in stronger signals from nearby American stations. Until 1968, cable systems were not subject to regulation by the broadcasting authority, and they certainly had no "Canadian content" responsibilities. During the 1960s and 1970s, Canada became the world's most "wired" nation, with over one household in two subscribing to cable, and receiving, therefore, a greater number of programme services, Canadian and American, than anywhere else in the world.[6] The result was a much greater fragmentation of the audience, and another obstacle in the way of the Canadian broadcaster fulfilling his commitment to show Canadian programmes. In fact the proliferation of cable might have resulted in the bankruptcy of numerous privately owned television stations had not the CRTC found ways of circumventing the worst effects. Its most potent measure in protecting the revenues of Canadian stations was to require cable systems to delete the programming of an American station when its scheduled programme was being released simultaneously by the local (Canadian) station. When such a deletion was made, viewers would see the same American programme, but with locally sold advertising, over two or more cable channels; and the local television station could sell advertising at higher rates because it could deliver to the advertiser the total number of viewers receiving both channels. Such strategems did nothing to increase the viewing of Canadian programmes unless the Canadian stations used their protected revenues to produce more programmes of their own or to procure additional programmes from Canadian production houses. There is little evidence that this has been the result. Between 1967 and 1977, operating profits of private television stations rose from $15.9 million to $81.4 million.[7]

Cable television has also been extremely profitable for the owners of the larger systems. Cable revenues between 1967 and 1975 increased by 734 per cent — from $22.1 million to $162.3 million. Cable rates of return have been high in recent years — 24 per cent return on net assets before tax in 1978.[8] The consequences have been the consolidation of ownership in fewer hands (for example, the amalgamation of Rogers' Cable TV, Canadian Cablesystems, and Premier Communications — three of Canada's largest cable companies — into one entity), and the investment of surplus funds in a rapidly expanding American cable industry. A miniscule proportion of the proceeds has been employed in the production of programmes or the compensation of over-the-air broadcasters for the use made of their signals. The CRTC has sought to encourage both of these objectives, but, perhaps as part of the legacy of the unregulated past, cable companies have not paid more than lip-service to such supposed obligations.

It was, after all, one of the avowed purposes of the government in introducing a new Broadcasting Act in 1968 to bring cable television fully into the broadcasting system as a whole, to make it subject to the regulatory authority of the CRTC, and to have it meet the long-standing objectives for Canadian broadcasting that are set out in section 3 of the Broadcasting Act. This act declares specifically that all broadcasting undertakings constitute a single, integrated system; that the two principal instruments to achieve the single system are the publicly owned national service provided by the CBC and the regulatory and licensing functions performed by the CRTC; and that the objectives of the system include a commitment to varied and comprehensive programming that will use predominantly Canadian creative and other resources; and arrangements that will safeguard, enrich, and strengthen the cultural, political, social, and economic fabric of Canada.

The Present Broadcasting System

By 1982, Canada had in place a well-developed and sophisticated physical system to deliver a variety of programmes and programme services to most sections of the population. It has a strong public corporation to produce and distribute programmes in both official languages with originating transmitters and rebroadcasting stations spotted across the country. It has a prosperous private television industry, with a national network in English and a regional network in French (TVA) that also serve the vast majority of English- and French-speaking Canadians. Some of the larger stations (particularly CFTO-TV in Toronto and CFTM-TV in Montreal) own associated production houses capable of producing not only programmes for the networks of which they are a part but for other services as well. Cable systems are available to over two thirds of Canadian households, offering services of up to thirty channels, and that number will increase if fibre-optics technology is adopted. Canada has an advanced communications satellite system, of which the CBC is the largest single user. These are the elements that together can provide many other programme and information services, including pay-TV on a national scale, if that is desired.

The weaknesses of the system stem from the competitive disadvantages that Canadian stations or networks realize when they attempt to compete with American networks in programme origination. It is a very unequal struggle for Canadian networks, private or public, to attract audiences for Canadian entertainment programmes against American competition. The advantages on the American side are overwhelming. An hour of Canadian programming of professional quality may cost up to $100 000 or even $200 000 to be shown to the viewers of one language group within the country. A comparable American programme is produced for a potential audience fourteen times as great as the English-speaking population of Canada. The disparity is very plain when one places the cost of producing a Canadian programme against the cost of importing an American production for Canadian showing. Even the costliest American television programmes are available to Canadian networks for about $10 000 per half-hour. And these offer Hollywood production values, American network promotion, publicity in the print media of both countries, and name performers. No wonder that Canadian advertisers, and American advertisers through their Canadian subsidiaries, scramble to have their names associated with these imported programmes. The result is that the proportion of the audiences viewing Canadian programmes continues to decrease, even in French Canada. The extension of American networks into all parts of Canada through cable transmission only intensifies the problem.

The CBC has served as a bastion in providing a varied complement of Canadian programming, but its place in the total system is less than it once was. Over the years the private stations superseded the CBC in numbers of stations, share of audience and, in all probability, influence on policy makers. Nevertheless, the CBC remains predominant in the production and distribution of Canadian programmes. In 1976 there were 73 private television stations and 25 television stations owned by the CBC. The revenues of private television stations in 1977 were about $330 million, of which about 40 per cent was spent on the production and purchase of programmes. The CBC in 1975–76 received about $315 million for the production and distribution of its radio and television programmes — about 80 per cent of its operating budget.[9] As for Canadian content, in November 1977 CBC-owned stations carried 63 per cent Canadian programmes, whereas private stations and networks broadcast on average 45 per cent Canadian programmes. If television schedules in prime time are examined, the discrepancy grows. In 1978–79, between 8:00 and 10:30 p.m., the CBC French network had 71.4 per cent Canadian content, the CBC English network 68.5 per cent, CTV 5.7 per cent, and CFMT, the flag station of the private French network (TVA), 28.5 per cent.[10]

Given the high profitability of the private television industry, it should have been possible for the private stations to produce a better record than this, even in the face of American competition. Both the BBG and the CRTC — the CRTC especially — have tried by regulation to improve the situation, and there is little doubt that in the absence of regulation the performance of private television stations and networks would have been worse. Unfortunately, as several investigations have demonstrated, regulation is too blunt an instrument to secure and maintain a meaningful degree of Canadian content or other desired standards in programming.[11] Even with Canadian content regulation, many stations have served principally as funnels to import and distribute American programmes. The answer does not seem to lie in licensing additional television stations or networks such as Global in Ontario. Other than additional news programmes, little has been added to the Canadian quotient. More has been achieved by the Canadian educational services such as TV Ontario, but they seldom reach large audiences.

All this suggests that the Canadian Radio League was right in concluding so early in the story that a publicly owned production agency must be at the centre of an indigenous broadcasting system; that the means of distributing Canadian programmes to listeners and viewers must be guaranteed and not left to the goodwill or whim of the private operator; and that obligations of private broadcasters and distributors must be controlled by statute or other regulatory means.

Fitting Pay-TV into Canadian Broadcasting

We are now about to add pay-TV to the other services that make up the broadcasting system. The danger is that rather than building on the successes we have already achieved, we may authorize or accept a system of pay-TV that bears little relation to the objectives of the broadcasting system as a whole. In the absence of a strong popular demand for a pay-TV service, or public discussion of its possible implications, government leaders and members of the regulatory commission may settle for short-term expedients and solutions, and may respond to immediate pressures from vested interests. One can see the possibility of sacrificing the national interest in the face of provincial demands for local control, or of abandoning the concept of a national trust that has been the foundation of each broadcasting act in the past. It seems incontrovertible that the decision by the government and the CRTC to proceed with pay-TV was taken *despite* evidence of very limited popular demand. According to a public opinion survey commissioned by the CRTC early in 1981, only 14 per cent of all cable television viewers said they would be "very likely" to subscribe to pay-TV if introduced in Canada, and only 5 per cent of those did not already have cable. John Meisel, CRTC chairman, admitted in an interview that "there's no major stampede for pay-television services in Canada."[12]

Why then the decision to proceed with pay-TV? Partly it is a response to the fact that the technology is there, and there is some compulsion on the part of those already in the field to make use of it lest someone else appropriate it. Partly it is the force of the American example, where pay-TV was developed profitably in several communities, most notably by Home Box Office. Principally it was the continued agitation of the Canadian cable industry that saw pay-TV as another service that could be added (for a fee) to the television services the cable companies were already providing. Their campaign intensified as reports became more frequent of communities and persons installing dishes to receive American satellite signals without the intermediary of a licensed cable operator.

For many Canadians, pay-TV will be a peripheral service, icing on the cake, a way of enjoying movies in the home without commercial interruptions. It may be tempting to meet these modest demands without worrying too much whether the principles underlying the service harmonize with those we have adopted for more conventional broadcasting. But such a development could easily undermine the objectives we have spelled out in existing legislation, while at the same time reducing rather than enhancing the capacity we have for Canadians to speak to Canadians with an even chance of being heard. A country that does not take charge of its own mass communications is in peril, since otherwise the content and style of the majority of messages received will not correspond to the values and beliefs, the social and political relationships, nor indeed the practical concerns of that people. As the Clyne Committee observed:

> Canadian sovereignty in the next generation will depend heavily on telecommunications. If we wish to have an independent culture, then we will have to continue to express it through radio and television. If we wish to control our economy then we will require a sophisticated telecommunications sector developed and owned in Canada to meet specific Canadian requirements. To maintain our Canadian identity and independence we must ensure an adequate measure of control over data banks, trans-border data flow, and the content of information services available in Canada.[13]

Pay-TV in itself is not important enough to threaten Canada's continued existence as a sovereign state, but as an indicator of what we intend to do with cable and satellite technologies it can have a most profound significance for our future development.

The argument is sometimes advanced that the new technologies in effect erase national boundaries. How, so the argument runs, can we prevent individuals from picking up programmes from American satellites with dish antennae in their back yard? If individuals can do this, if they wish to go to that expense, has the state any right to forbid cable companies from receiving and transmitting such programmes, including American pay-TV services? International agreements be damned! The argument goes further: does it matter anyway whose signals are received? Have not the national differences already been obliterated? One communications engineer (and cable company executive) writes, "We must give up this cultural sovereignty nonsense and recognize that Canada and the U.S. are one single entertainment market just as they are one automobile market. . . . There is really so little difference as to be immaterial."[14]

This contention is hardly novel. When television itself was new, there were private entrepreneurs in Canada who thought all they had to do was hook on to an American network and suck programmes in through a pipe. They blamed the CBC and the government of the day for denying them this right. One of the applicants for a television licence in Toronto grew so frustrated that he picked up his stakes, left for Los Angeles, and became a sports and television mogul in that city (as well as an instant American citizen through a special act of Congress).

The answer to that contention must be that most Canadians do in fact recognize a Canadian identity, and when they have had to choose they have opted for political arrangements that would safeguard that separate identity. On an individual basis, they will not hesitate to express preference for American programmes, especially American light entertainment programmes, but so far they have always wanted to retain the national capability of producing programmes for their own needs. This determination, this feeling of distinctiveness, will not disappear suddenly with the positioning of a few more satellties in the sky. Even so, given all the transborder influences at play, we may find that the feeling of a separate identity wears away in time, and it is only prudent to adopt such policies in communication that will not destroy the heritage history has bequeathed us.

Whatever new means of delivery technology brings us, Canadian broadcasters and film makers must not lose their capacity to produce programmes that will respond to these latent Canadian desires to know and to understand themselves. It would be folly of the worst kind if through public decisions we robbed those individuals and institutions with programme expertise and experience of the chance to create programmes better than they have ever done. Such a choice would also stunt the development of a host of creative and performing talents at a time when these have just developed. Pay-TV, predominantly American as it will doubtless be, can have these unfortunate results unless the profits are channelled into more Canadian production, distributed not only through pay-TV but by other means, including conventional broadcasting.

In spite of all that has been said in criticism of Canadian television, we now have an elaborate and workable structure for the delivery of programmes to Canadian viewers, and a considerable production capacity in French and English. Without our broadcasting stations and networks, public and private, Canada would be only half a country. Since pay-TV as at present projected is essentially a premium service for those who can afford it, we should not allow it to destroy the free over-the-air programme services of the conventional broadcasters. This might result if the government and the CRTC respond merely to the pressures of those who see themselves as the chief financial beneficiaries of pay-TV, or if the federal Minister of Communications accedes to the requests of equipment suppliers (and even a provincial minister or two!) to allow the unauthorized reception of American pay-TV through the installation of ground receivers. Pay-TV should be regarded as a public trust, to augment, not to diminish, the broadcasting system in its entirety.

Alternative Policies for Pay-TV

Let us then consider some alternative policies for the introduction of pay-TV to see which will *add to* our capacity to exchange information and entertainment among Canadians, and which will *diminish* the capacity we now have. Three of the more important issues that should be considered are the common distinction between production, distribution, and exhibition; the scope for national, provincial, or local systems; and the actual content of any pay-TV scheme.

The Production/Distribution/Exhibition Distinction

It is now customary to identify three distinct functions involved in the provision of pay-TV to Canadian subscribers: first, *production*, or the creation of programmes; secondly, *distribution*, or the assembling, packaging, and distribution of programmes by contractual arrangements with local exhibitors; and thirdly, *exhibition*, that is, the delivery of pay-TV programmes to local subscribers.[15] The single-word labelling of the three functions does not convey the full implications of the process for structuring a workable system, nor does it suggest the complete array of responsibilities that would fall to any person or organization undertaking to discharge them. We should examine each in turn, keeping in mind the goal already stated: to determine what arrangements will further the established objectives of the broadcasting system as a whole while providing the optimum variety of services made possible by the newer technologies.

Production includes the planning, origination, and production within Canada or by Canadians of programmes intended for showing on pay-TV. The process by which programmes actually reach the viewer is not part of production, but rather of the other two functions, distribution and exhibition. The implication is that those who produce programmes are not necessarily the same persons who distribute or exhibit them. At the present time there are a number of producers and production agencies involved in the origination of programmes for showing on over-the-air television, and many of these are able to expand their production capabilities if the demand warrants. For example, there are independent film producers, production planning units in advertising agencies, the National Film Board, independent television production companies (such as Nielson-Ferns International), Canadian subsidiaries of American film companies (for example, Columbia Pictures of Canada), television production houses associated with private broadcasting stations (such as Glen-Warren Production, an offshoot of Baton Broadcasting, operators of CFTO-TV in Toronto), individual private television stations, the CTV Network, Réseau de télévision TVA, regional television networks such as Global Television, educational television organizations (such as TV Ontario and Radio-Québec), and the CBC, in its English- and French-language services — the largest producer of all. All of these might be drawn on for the production of films, feature programmes, and the broadcasting of special events.

The existing cable companies are also programme producers to an extent, since they originate programmes for their local or community channel, an obligation placed on them by the CRTC. Cable television outlets also make use of programmes produced by radio and television organizations within their communities, such as organizations interested in multilingual services, children's programming, or adult education. Although it is doubtful whether many of these productions would have the professional polish to attract large numbers of paying customers, such community services may at least provide some training experience.

A diversity of programme sources is desirable for pay-TV so that the distributor and exhibitor can present the most attractive package possible. It is particularly important that Canadian presentations do not suffer in comparison with expensive productions procurable from American and other international sources. There is no need for any chosen instrument to serve as the production arm of pay-TV. In time, some producers will emerge as providers of the most attractive programmes, and these will tend to be favoured by the distributors and exhibitors. That sifting out should not be a political decision.

It is obvious, therefore, that to prepare and originate programmes, producers do not need to be licensed by the state. Governments, however, may establish incentives to encourage the domestic production of programmes and films for pay-TV, as they now do through the Canadian Film Development Corporation (CFDC). A public agency may also have to determine which programmes are to be classified as Canadian productions if a Canadian content requirement is placed on pay-TV.

However produced, programmes for pay-TV are unlikely to reach large audiences on the sole initiative of the individual producer. It is conceivable that producers could make their sales to local exhibitors one by one, but such an effort would hardly be economical. The more practical arrangement would be for the producer to enter into contract with a distributor who has the means of reaching a large number of outlets for exhibition to the paying public.

Distribution is inadequate in describing the important role played by the distribution company or agency. At first blush, "distribution" seems an almost mechanical process for the conveying of programme messages from producers to intended audiences. The process is far more complex and fundamental than that. The distributors are those whom the Clyne Committee called programmers or providers.[16] They decide what "mix" of programming to provide, what kinds of variety or repetition, what programme elements will meet the tastes and interests of the viewing public, what will attract viewers in large numbers, what will *pay*. Theirs is also the most crucial function in ensuring that the objectives set out by law makers are met. Their judgements determine what programmes the producers will make and sell. The way they package the programmes they buy or accept, the timing of their release, the scheduling of programmes on a nation-wide or province-wide basis, will determine the viability of the entire pay-TV operation. Their promotion of the programmes and programme packages will in large part determine the size of audiences and whether pay-TV "catches on" in Canada. The promotion they give Canadian originations will help decide whether Canadian viewers are attracted to Canadian features, or whether the Hollywood-based film companies complete their domination of the Canadian market. In fact, the role of the distributor has as much to do with *content* as with *carriage*. The choice of the appropriate agency or organization to act as distributor of pay-TV, or one of the distributors, is therefore crucial if pay-TV is to serve Canadian-determined objectives.

The local exhibitor of pay-TV must attract the largest possible number of viewers in his district if financial returns are to be maximized — a reasonable profit for him, and a share of revenue to be used for increasing the amount of Canadian production, or for related national purposes. Thus the task of promotion (essential for developing an audience in pay-TV) should be shared by the network distributor/programmer and the local exhibitor. The quickest way to gain audience and sizeable profits is to buy exclusive rights to features of mass appeal, including national sports events, big-budget movies, and entertainment programmes headed by stars of international reputation (the type of entertainment produced at Las Vegas). If cable companies were also the network distributors, there is little doubt that these attractions would be scheduled at the expense of quality programmes of wide but more specialized appeal, at the expense particularly of existing over-the-air broadcasters and networks. Thus the objective of a pay-TV service to complement or add to existing broadcasting services, without replacing them, would be lost. It should be public policy not to add pay-TV (a service for the minority able and willing to pay) in a way that will damage the existing television broadcasting system: a system that, while by no means perfect, has extended coverage remarkably in the last twenty-eight years to all sections of this vast country, in two languages, and with a larger component of Canadian programming than will be possible with pay-TV.

The temptation to "siphon off" the most popular programmes from existing networks must be resisted and guarded against in any structural arrangement instituting pay-TV. This consideration among others suggests that cable companies alone should not be entrusted with undertaking the national distribution of pay-TV services. The cable industry has prepared itself for this assignment through the formation of a Pay-Television Network, a corporation to acquire and package programmes for national distribution, and Cable Satellite Network, Inc., a consortium of cable companies to deliver a package of television services to subscribing cable systems.

If cable companies — which are being consolidated into the hands of fewer owners — were to perform the national programming function as well as the exhibition function, they could hardly be blamed for taking such short cuts as the law allows to increase their share of the revenues that sustain the present broadcasting system. In such an arrangement, the only safeguard would appear to be an interventionist regulatory agency to adjudicate on the one hand between the pay-TV industry and, on the other hand, all other interests: producers, private television stations and networks, and the CBC. The regulatory agency in effect would have to make programme decisions continually, and such a role is one that a regulatory body is poorly equipped to play.

We have suggested that cable companies are likely to play the principal part in providing local exhibition of pay-TV, at least in the more populated areas. Cable has developed faster in Canada than in any other part of the world, and it is only sensible to take advantage of this fact. In some cities, cable operators have sold their existing services to almost all the potential subscribers, and they are looking for ways to continue growing. Pay-TV will be an additional service they can provide, an additional source of revenue; but it need not be the bonanza that some are hoping for. In their position of holding local monopolies, cable companies should expect to have their rates regulated as is true of the common carriers. As well, there are new services other than television that cable may be equipped to provide — information and marketing services, for example. Even though in some of these non-broadcast services the cable companies may have to compete with common carriers such as the telephone system, they should be able to garner enough new revenues from them to maintain theirs as a growth industry.

National versus Provincal versus Local Systems

The next question is whether pay-TV is to be principally local, principally provincial in extent, or principally national. If pay-TV is essentially a closed-circuit operation, serving (as it now does in some locations) large hotels or apartment complexes, the distributors could be numerous, and they could be regulated by provincial or even municipal authorities. There seems no need to accept such a limited future for pay-TV in Canada. As we have pointed out, Canadians have already built and paid for a large physical plant to distribute other kinds of programmes and messages, and it is surely wise to take advantage of existing facilities and additions already planned.

In particular, satellite transmission combined with a variety of means of local exhibition, principally cable systems, seems made to order. Such a system makes possible the delivery of live programming, and is the system used by the largest pay-TV enterprise in the United States, Home Box Office (a subsidiary of Time-Life). The satellite-to-cable mode of delivery facilitates nation-wide viewing of many programmes, makes practical the pursuit of national objectives, takes advantage of the technical expertise of existing components of the broadcasting system, reduces the likelihood that Canadians in large numbers will try to construct and operate their own ground receivers, and through the process of encoding protects the proprietary rights of programme producers or distributors. Pay-TV can then be developed together with other satellite-television services and policies so that satellite capacities may be used to the best advantage for all Canadians.

As a result of its hearings on pay-TV in 1977–78, the CRTC recommended that there be a single national pay-TV network for Canada, and that this agency should "negotiate the best possible contractual terms with common carriers for the distribution, whether by satellite or microwave, of pay programming. . . . The national agency should be directly responsive to regulatory requirements to achieve national policy objectives."[17] At that time the CRTC reasoned that a single national agency would have the maximum opportunity to generate Canadian-produced programming, would be able to procure American programmes on the most advantageous terms, could operate with economies of scale, could guarantee fully national exhibition, and by voice-overs, dubbing, or subtitling could offer some of the same programmes to French- and English-speaking audiences. The federal Department of Communications, in its discussions with provincial communications ministers, seemed to adopt this recommendation, adding:

> The agency should determine the most appropriate method of delivering programs to local exhibitors based upon favourable contractual arrangements (e.g. satellite, microwave, bicycling). However, satellites should be the preferred method of delivery and should be used as soon as possible.[18]

The recommendation as then stated left open the nature of the agency or agencies (should there be one for each language), but the important point made was that the *delivery* function was central to the choice of the new broadcasting structure for pay-TV. Such a concept would make possible the harmonization of pay-TV's method of operation with accepted national objectives for broadcasting as a whole.

Nevertheless, the nine-member Therrien Committee (including some provincial representatives) that reviewed pay-TV prospects for the CRTC in 1980 recommended that a Canadian pay-TV system *not* be entrusted to a single national agency. This at least was the opinion of a majority of the committee.[19] The supporting argument was that a "single national pay-TV agency could [not] effectively balance the respective needs for pay-TV in English and French," and that pay-TV not dependent on radiocommunication may lie outside federal jurisdiction. It would seem sensible, however, to regard provincial and local pay-TV services as supplementary to a national pay-TV system, and not to jeopardize the creation of the latter through jurisdictional wrangling.

In its "Call for Applications for Pay Television Service" on 21 April 1981, the CRTC reversed its former position and extended the recommendation of the Therrien Committee in inviting applications for new services to be originated "either nationally or regionally as networks, or locally as independent 'stand alone' systems." It did so while expressing a distaste for "monopoly control," adding that it did not wish to "limit applicants to a particular structure of national or regional program distribution."[20] One way of looking at this statement is to suggest that the CRTC has not yet made up its mind as to what sort of structure will best carry out the objectives of the Broadcasting Act. Another is to conclude that the CRTC has paid little attention to what principles in the past have led most successfully to the provision of Canadian programming.

In a review of the CRTC's "Call for Applications," eight national organizations constituting the Joint Action Committee on Broadcasting argued that "multiple competing systems would result in" the following:

- Fragmentation of potential revenues
- Loss of economies of scale essential in the small Canadian market

- Duplication — and thus increase — in marketing, packaging and promotion costs
- Increased costs of American product as a result of competitive bidding
- Reduction in the total funds available to Canadian production
- Potential loss of federal jurisdiction and ability to regulate provincial systems such as the one now operating in Saskatchewan.[21]

At the time of writing, it appears that one or more of the potential applicants for an English-language pay-TV service are going to make it a condition of their application that not more than one national pay-TV service be licensed in English.

It would still be preferable to have a national distribution agency recognized (or two agencies, one for each language) to operate as a national trust. It would encourage the production of Canadian features that could be placed alongside of imported films and other attractions. It would effect contractual arrangements with common carriers, such as Telesat Canada, and with local exhibitors, principally the cable companies licensed by the CRTC. In some instances it might have a choice of local exhibitors — perhaps a master antenna television system (MATV), an over-the-air subscription television station (STV), or a cable television company.

Since a national agency ought to be accountable for the way it carries out its mandate, ideally it should be created by a statute spelling out the objectives that as a statutory body it is expected to pursue. The government has unfortunately shown no interest in pursuing this course. The next best instrument is a licensed national distributor, or perhaps two (one for each language), non-profit making, with a board of directors answerable to the CRTC for the way in which it serves the objectives of the Broadcasting Act. Such an agency need not be publicly owned, but its operational surpluses should be applied to further publicly recognized objectives. Profit taking should be restricted to the other segments of the pay-TV process — that is, to production and exhibition.

The Content of Pay-TV

From the discussion so far, the principles that should govern the establishment of pay-TV in Canada are beginning to emerge, that is, if the objectives for the entire broadcasting system are to be reaffirmed. Before an attempt is made to fashion a structure for pay-TV in more specific terms, it is advisable to consider the nature of the programmes that pay-TV will deliver, whether the profit objective should override all others, who should be the principal beneficiaries, what the audience is likely to gain in diversity of programmes offered, and whether the Canadian production capacity for good programming will increase.

We should first recognize that a national system of pay-TV will not get off the ground unless there is a very large proportion of programmes of the widest audience appeal. Pay-TV is likely to seek out the same kinds of entertainment programmes that commercial broadcasters would like to have but may not be able to afford on a regular basis. However much a person with more developed or specialized tastes may wish it otherwise, programmes of mass appeal — movies, sports, entertainment specials — will provide the returns that make the pay-TV enterprise possible. This will be so whether pay-TV is offered on a pay-per-channel or a pay-per-programme basis. It should be possible in addition to have some proportion of programmes in the schedule of more specialized appeal, where an audience in the tens or hundreds of thousands will be willing to offer support through its pay-TV subscriptions.

Canadians do not differ substantially in their tastes for light entertainment from Americans, who in a competitive situation have all the advantages in producing such entertainment. (There are some differences in French Canada that go beyond the language difference, but even these may be eroding under the influence of television and the film.) One must assume that the most popular ingredient of pay-TV in this country will be American in origin. The question then arises of how to implant a modicum of good Canadian programming into a medium that will be used much or most of the time to transmit American feature entertainment. In its 1978 report on pay-TV, the CRTC noted that representatives of both the private broadcasting and cable industries opposed Canadian content rules. The Commission concluded that no single proposal for pay-TV at that time had reached "an acceptable level of commitment to present broadcasting policy objectives and requirements." The CRTC restated its position that "pay-television must be a predominantly Canadian service."[22] The more recent Therrien Committee report modified the statement of this objective in more realistic terms:

> Approval should be given for the introduction of pay-television and other optional services . . . on condition that these new services make a significant and positive contribution to broadcasting in Canada, make effective use of Canadian resources, and that a significant amount of the revenues flow to the Canadian program-production industry.[23]

And further:

> The Committee hopes that, in formulating new regulations, the CRTC would consider methods of measuring the Canadian content of

pay-TV and other services by levels of expenditure as well as applying minimum hours.[24]

The Joint Action Committee and its allied organizations had urged a minimum of 60 per cent Canadian content for pay-TV, whereas the consortium of cable companies, Pay-Television Network, suggested that 30 per cent Canadian content might be feasible at the start. The CRTC's "Call for Applications" did not set any particular requirement for Canadian content, but said that applications would be reviewed on the basis of "percentage of exhibition time" that was to be Canadian, "percentage of programs acquired," and "percentage of gross revenues spent on the acquisition of Canadian programs."[25] The difficulty with this procedure is in the experience we have had previously with "promise of performance." The Joint Action Committee asks, "How would the Commission avoid repeating the Global pattern if an established pay system sought exemption or reduction of promised levels of Canadian content as essential to its economic survival?"[26] If it is granted that conventional over-the-air broadcasting and other forms of free programme service are more important to the future of Canada than is pay-TV (and that is surely so), then the lack of stipulation for the *amount* of Canadian programming on pay-TV at this time is less important than the question of how to use the proceeds in the interest of better Canadian production and its effective utilization. It is this vagueness in the CRTC's statement that is most ominous.

What is needed is a pay-TV operation that will maximize revenues but not profits. A way should be provided to have pay-TV run by a group that will choose the most attractive programmes from all sources (including some programmes for specialized audiences), to be scheduled by skilled programmers in ways that attract the largest audience of subscribers. The group should be treated as an agency that will understand the meaning of responsibility and public accountability, that will contain among its members some with experience in the programming and scheduling fields, and that knows how to encourage domestic production. It will need enough technical and commercial experience to deal with American programme suppliers, production organizations in Canada, and cable companies or other exhibitors in order to conclude the most advantageous contractual arrangements.

Canadian content regulations, at least as they have been conceived to the present, have not been effective in guaranteeing support for Canadian production of high quality. A report prepared for the CRTC in 1980 pointed out:

> It is of interest to note that during this period [1974 to 1978], when the performance of English language private television is most in question, the overall revenues and the profits of television increased

at a healthy rate. From 1967 to 1977 television revenues increased from $95.2 million to $331.7 million, or at a rate of 249 per cent. Similarly operating profits rose from $8.411 million in 1967 to $103.79 million in 1977.[27]

The reason that private television's increased revenues were not reflected in increased good Canadian programming was, of course, that it was not in the self-interest of the stations to pour money into expensive productions if there were not immediately increased profits to be made from them. And CTV, the network owned by its affiliated stations, is always starved for funds, for the same reason. The larger and more prosperous stations would rather keep their profits for themselves. Here is an instance, therefore, of simple regulation proving unable to overcome structural constraints inherent in the system. In pay-TV, we should avoid building in a similar limitation.

The CBC's brief to the Therrien Committee made some pertinent observations that have not been adequately responded to by the CRTC:

> The transformation of Canadian broadcasting, in the end, will be brought about by a sustained thrust toward three complementary goals; increasing the volume and viewing of entertainment programming produced in Canada, increasing the volume and viewing of programs that reflect the distinctiveness and diversity of Canadian culture, and the creation of a production industry that can compete in the international market place. Pay-TV, properly managed, could constitute one potential source of funds to realize our strategy.

The CBC brief also argued:

> Canada must not repeat the mistakes of the early nineteen sixties, when no attempt was made to capture for our production industry the revenues generated by cable delivery of American television signals to Canadian homes. Then, as now, we were faced with the challenge of translating what was clearly a danger to cultural sovereignty into an opportunity for significantly increased Canadian production.[28]

The CBC then put forward a proposal that Canada's national television services (CBC, CTV, TVA) join together to provide network pay-TV; that they account to the CRTC and to the public for the disposition of funds; that 5 per cent of pay-TV's gross revenues go to a fund for programme development; and that net revenues be allocated to the public and private network authorities on a formula to be agreed upon for the production of Canadian programmes. Although this proposal had some promise for the creation of a structure that could perform in furthering the objectives of the 1968 act, it found no favour with the CRTC, and the television networks have since abandoned this proposal.

A Structure to Match Objectives

In a short essay it is not possible to outline a structure for organizing Canadian pay-TV in detail, or to furnish justifications for each suggestion made. However, here are some of the broad lines along which it might be possible to proceed.

1. The programming and distribution function is crucial. Two parallel national agencies should be recognized or licensed, one to plan, organize, and distribute pay-TV programmes in English, the other to do the same for programmes in French.
2. The two agencies should have publicly selected, or at least publicly sanctioned, boards of directors, accountable to the CRTC for the observance of its general regulations, but carrying out in particular the purposes outlined in the Broadcasting Act and in CRTC announcements, and answerable for living up to the promises made at the time of licensing. If cable television is established as a field of concurrent jurisdiction, there might be provision for consultation with the provinces before the two boards are selected or approved.
3. The CBC and the licensed private television networks should have representatives on each board to advise on matters in which they have experience or expertise. The CBC in particular should be adequately represented because of its greater responsibilities under the Broadcasting Act and because of its greater volume of production.
4. The two agencies should be non-profit organizations, but they should be asked to maximize revenues consistent with the delivery of a schedule containing a reasonable component of Canadian programming, and consistent also with the welfare of the existing broadcasting system. A share of gross revenues — perhaps initially through an arbitrary figure — should be allocated to independent production agencies for development purposes. Excesses of revenues over expenditures should be allocated (1) to the commissioning or purchase of additional Canadian programming for pay-TV in succeeding years, and (2) to the improvement of Canadian programming on the CBC and private television networks.
5. Canadian content regulations should not insist on a quota equivalent to that established for over-the-air television broadcasters. Reliance should be placed mainly on the two agencies operating as a public trust. They should be expected to devote a "fair" proportion of their revenues to the purchase of Canadian-produced programmes.

6. Consultative committees should be established on matters affecting exhibitors and independent producers of programmes.
7. The choice between pay-per-programme and pay-per-channel television should be made by the Minister of Communications with the advice of the two pay-TV agencies and the CRTC.
8. The preferred method of distribution should be by satellite transmission to cable systems. The institution of pay-TV should not preclude the development of other, probably more essential, services as, for example, the plans for CBC TV-2 to be distributed by similar means. However, "super-stations" should not be licensed to distribute commercial programmes by satellite and cable, nor should pay-TV services be allowed to draw on advertising revenues.
9. The profits of cable-company exhibitors from the pay-TV operations should provide a reasonable rate of return to the cable owners on that part of their investment related to pay-TV. Cable profits should not be allowed to grow at the sacrifice of adequate funds for the Canadian production industry.
10. Pay-TV alone cannot be expected to finance the necessary expansion in film and television production. The CBC will still need generous appropriations, and a tax-incentive plan should be considered to aid private investment in television production. The CRTC should revise the requirements now imposed on private television stations so as to ensure in the future that an adequate proportion of their revenues is devoted to Canadian production and to its network distribution.

Any structure intended to provide a pay-TV service and at the same time to preserve a distinctively Canadian broadcasting system will be successful only if governments, after sanctioning the institutional arrangements, give the system the necessary continued support. This they have failed to do in the past. With respect to pay-TV specifically, the government may have to contribute share-capital to the non-profit companies charged with the undertaking, either directly or through the participation of the CBC. The government should approve the directors nominated for each company; and it or the CRTC should ensure that each board of directors appoint managers of experience and competence. The government should expedite its satellite programme so that essential broadcast services will be provided to all parts of the country; and it must adopt measures to ensure that the programme production industry will get the financial support it needs to face the magnified competition from American super-stations and pay-TV. Above all, the government must *believe* in the communications system it fosters, and act with conviction to ensure its future. On such belief and action the future of Canada depends.

Notes

[1] Graham Spry, "The Fourth Crisis in Canadian Broadcasting," *Special Supplement on Pay-TV, Cinema Canada* (August 1976), pp. 10–11.

[2] Department of Communications, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, *Telecommunications and Canada* (Ottawa: Minister of Supply and Services Canada, 1979), p. 1. Hereafter cited as *Telecommunications and Canada*.

[3] On the early history of public broadcasting in Canada, see Frank W. Peers, *The Politics of Canadian Broadcasting, 1920–1951* (Toronto: University of Toronto Press, 1969).

[4] In 1965 the Fowler Committee concluded: "In general, the addition of a private station has increased the viewing of American programs.... Private stations import about twice as many American programs as the CBC. This seems to be the most important factor in the consumption of American programs by Canadians." Canada, Secretary of State, *Report of the Committee on Broadcasting* (Ottawa: Queen's Printer, 1965), pp. 34–35.

[5] Figures showing the profitability of private stations and particularly the nine "second stations" are quoted in Frank W. Peers, *The Public Eye: Television and the Politics of Canadian Broadcasting, 1952–1968* (Toronto: University of Toronto Press, 1979), p. 292.

[6] Canadian Broadcasting Corporation, "Pay-Television in Canada: The CBC's View," (Ottawa, 1976), pp. 1–2.

[7] Canadian Radio-television and Telecommunications Commission, *Special Report on Broadcasting in Canada, 1968–1978* (Ottawa: Minister of Supply and Services Canada, 1979), Vol. 1, p. 85.

[8] Robert E. Babe and Philip Slayton "Competitive Procedures for Broadcasting — Renewals and Transfers," a study prepared for the Department of Communications, September 1980, p. II-8. See also Robert E. Babe, *Canadian Television Broadcasting Structure: Performance and Regulation* (Ottawa: Minister of Supply and Services Canada, 1979), p. 124.

[9] CRTC, *Special Report on Broadcasting in Canada*, p. 85; see also Babe, *Canadian Television Broadcasting Structure*, pp. 103–4.

[10] Data from CRTC, *Special Report on Broadcasting in Canada*, cited in *Conference 80*, booklet published by the Canadian Broadcasting League (Ottawa, 1980), p. 16.

[11] See Secretary of State, *Report of the Committee on Broadcasting*, Chapters 5 and 13; also Babe, *Canadian Television Broadcasting Structure*, Chapter 7.

[12] Robert Stevens, "Just 14% of Cable Viewers Feel Sure They Want Pay-TV," *Globe and Mail* (12 March 1981), p. 5.

[13] *Telecommunications and Canada*, p. 2.

[14] Israel Switzer, "How I Learned to Love the Satellite," in Peter S. Grant, ed., *New Developments in Canadian Communications Law and Policy* (Toronto: Law Society of Upper Canada, 1980), quoted by Babe in *Conference 80*, p. 22.

[15] Canadian Radio-television and Telecommunications Commission, *Report on Pay-Television* (Ottawa: Minister of Supply and Services Canada, 1978), pp. 37–40; Canadian Broadcasting Corporation, "Pay-Television and Canadian Broadcasting (Ottawa, 1980), pp. 8–11.

[16] *Telecommunications and Canada*, Chapter 3.

[17] CRTC, *Report on Pay-Television*, p. 38.

[18] Federal Discussion Paper on Satellite Distribution of Television Programming and Pay-Television, presented at the Federal-Provincial Conference of Communications Ministers, 16–17 October 1979, Doc. 830–54/024.

[19] Canadian Radio-television and Telecommunications Commission, Committee on Extension of Service to Northern and Remote Communities, *The 1980s: A Decade of Diversity: Broadcasting, Satellites, and Pay-TV* (Ottawa: Minister of Supply and Services Canada, 1980), p. 74.

[20] CRTC Public Notice, "Call for Applications for Pay Television Service," 21 April 1980, pp. 3 and 8–9.

[21] "Background Notes, Pay-TV" (mimeo, 27 April 1981), p. 6. The Joint Action Committee includes representatives of ACTRA (Association of Canadian Television and Radio Artists), the Canadian Broadcasting League, the Canadian Conference of the Arts, and five other organizations.

[22] CRTC, *A Report on Pay-Television*, p. 36.

[23] CRTC, *The 1980s: A Decade of Diversity*, p. 59.

[24] *Ibid.*, p. 75.

[25] CRTC, "Call for Applications for Pay Television Service," pp. 10–12.

[26] "Background Notes, Pay-TV."

[27] Canadian Radio-television and Telecommunications Commission, *Canadian Broadcasting and Telecommunications: Past Experience, Future Options* (Ottawa: Minister of Supply and Services Canada, 1980), p. 26.

[28] CBC, "Pay-Television and Canadian Broadcasting," pp. 7, 15.

The Introduction of Pay-TV in Canada: A Guide to the Plot and the Players

2

by
R. Brian Woodrow
Kenneth B. Woodside

It is commonplace to observe the many instances when art imitates life, but the introduction of pay-TV in Canada may well be one of those less frequent occasions when real life conspires to follow the artistic form. Indeed, the continuing and substantial conflict over pay-TV as a new service to be offered to Canadian viewing audiences has virtually all the elements of successful popular melodrama. Like a good (or bad) prime-time soap opera, the premise is simple and straightforward — competition among strong and powerful forces each seeking control over the same coveted prize — set against a backdrop of often subtle but important themes, working itself out through a plot filled with seemingly endless manoeuvre, and peopled by a large and sometimes colourful cast of characters. The themes and variations raised by the introduction of pay-TV are often characteristically Canadian, such as protection against American cultural domination, but sometimes they can be of more universal significance, such as the impact of rapid technological advance on established patterns of regulation and jurisdiction or the continuing debate over the virtues of monopoly versus competition. The plot as yet remains unfinished, but the action thus far would seem to fit quite neatly into at least four distinct acts, even though it is by no means clear exactly what the final outcome will eventually be. And the major players in this little drama are a diverse lot — cable industry entrepreneurs out to get a "piece of the action" as far as the introduction of pay-TV in Canada is concerned, governments at the federal and provincial levels jealous of expanding or defending their control over the new service, various elements within the broadcasting and related industries often appalled but also intrigued by its potential and prospects, a regulatory apparatus seeking desperately to give shape to a broadcasting system constantly under challenge from foreign programming and new technology, and the Canadian public as consumer and citizen alternating between amusement and annoyance as the issue drags on and on.

This essay attempts to provide an overview of the pay-TV issue as it has developed in Canada during the 1970s and early 1980s and a quick guide to the development of the plot and the background of the major players. The limitations to such an approach are readily apparent and should be acknowledged. The political process underlying the introduction of pay-TV in Canada is not pure drama where contrived characters follow a predetermined plot, but rather a more complicated and less certain exercise that only on one level approximates drama. Perhaps the best evidence of this is that the culminating decision about the introduction of pay-TV in Canada is just now being taken, and only with the benefit of hindsight will it be possible to determine more clearly winners from losers, villains from heroes, beneficiaries from victims. As well, the present essay represents only a first attempt at scripting the pay-TV issue and sets out the main characteristics of plot and players as appropriate to the task at hand. Much of the rich detail and relevant linkages to our understanding of public policy making in Canada must be left to subsequent and more extensive analysis. With those qualifications, let us proceed to outline the main themes and variations, the plot, and the players involved in the introduction of pay-TV in Canada.

Themes and Variations

The introduction of pay-TV, like most other issues, does not have any single theme that dominates discussion and deliberation as to the proper course of public policy. Rather such an issue raises a number of different themes and variations that appear on different levels and with different intensity as public policy takes shape over time. As well, these often disparate themes and variations do not usually bear exclusively on the particular issue of public policy under scrutiny but tap into broader currents of thought at work in the societal context at any given time. In this sense, an issue like the introduction of pay-TV in Canada will focus attention on certain themes that are characteristically Canadian as well as others that have broader or more universal significance. As well, themes and variations wax and wane in importance with the progressive development of the plot and continually take on new shades and nuances in almost kaleidoscopic fashion. Lastly, the players themselves become the primary agents for introducing these themes and registering their changing character over the course of the action. As a first step, it is useful to identify several of the more prominent themes and variations that the introduction of pay-TV in Canada has raised during the 1970s and 1980s.

The Challenge of Communications Technology

Pay-TV is only one of a number of technological developments in the communications field that challenge established patterns of jurisdiction and regulation not only in Canada but elsewhere.[1] Established patterns of jurisdiction and regulation in the communications field have been premised upon the need to treat broadcasting as a unified system overseen and controlled by the federal government. In practice, this pattern evolved because of the almost inevitable transmission of over-the-air broadcast signals across provincial and international boundaries and the widely shared goal of providing at least a minimum level of Canadian programming to all areas of Canada. Since the 1960s, however, the growth of cable distribution systems and the availability of satellite transmission have undercut to some extent the presumption of federal jurisdiction and the utility of government regulation. Pressures for more decentralized control of cable distribution systems and the new services they can carry have arisen at the same time that questions are being posed about the effectiveness and even the legality of regulatory action to safeguard the existing broadcasting system. In addition, the new communications technology holds within itself a significant potential to transform society, not only in terms of fragmentation of the viewing audience but also through more fundamental changes in the way we use communications technology. Pay-TV in Canada — even though it cannot in the pure sense be considered as a new technology given its already widespread availability in the United States and the way in which it tends to be treated as merely an extension of the existing broadcasting system — still represents the all too typical Canadian case of a somewhat shop-worn technology still outpacing the demonstrated capacity of established patterns of jurisdiction and regulation to meet the challenge of its introduction.

The Threat of Further Cultural Domination

The introduction of pay-TV in Canada raises the spectre of even more foreign, and especially American, programming finding its way onto Canadian television and thus the threat of continued and even greater cultural domination.[2] The rapid growth of pay-TV in the United States is significantly affecting American broadcasting, spurring the extension of cable distribution systems into the larger American cities and challenging the control exercised by the commercial networks, and having an important demonstration effect on Canadian broadcasting. Canadian conceptions of pay-TV are being shaped predominantly in terms of the American formula of recently released movies interspersed with special presentations and the attendant notion of a continental market for both the production and consumption of pay-TV programming. At the same time, the threat of further cultural domination as a consequence of the introduction of pay-TV in Canada, whether accomplished by default or by design, has gained substantial recognition. Over the past decades, efforts to counter the American cultural impact and to preserve and enhance

Canadian culture and identity have taken the form of protectionist policies relating to ownership and Canadian content, but the overall effectiveness of these initiatives is questionable. As well, there have also been more recent efforts to encourage the growth of the domestic feature film and programme production industries in order to make available a steady stream of high-quality Canadian programming. While significant political forces in Canada support the thrust and validity of such efforts, the reality of the situation as evident in the case of pay-TV is that, internally as well as externally, technology and economics continue to operate in favour of further cultural domination in the form of American programming.

The Creation of a New Industry

The introduction of pay-TV in Canada necessarily involves the creation of a new industry of one sort or another to market the service and, implicitly or explicitly, raises questions about the extent to which such a new industry can and should fit within any prospective industrial strategy. On the most obvious level, the scramble for pay-TV proceeds on the basis of visible self-interest and tactical manoeuvre as the major participants jockey for position and influence over the ultimate decision. The cable industry in Canada, fast reaching the limits of its natural growth, promotes pay-TV as a new service to consolidate and extend its role within the broadcasting system. The broadcasters, both public and private, are out to protect their privileged position and to counter the potentially disruptive effects of the new service. The domestic programme production industry remains ambivalent about pay-TV, recognizing the opportunity it offers for encouraging creative and technical work but also conscious of the danger posed by a possible influx of American programming. These and other interests all seek to play their part in the creation of any new pay-TV industry. In addition, however, there is also another level on which the debate over pay-TV takes place, and this is the more strategic level of how such an industry might fit within an overall industrial strategy. Pay-TV, as one of several new communications services, is extremely attractive as an emerging industry where Canada may hold specialized skills and a competitive advantage *vis-à-vis* other countries.[3] Both the hardware and software aspects of pay-TV have potential benefits as do related technologies like Telidon, all of which can be conceived as part of the emerging "information society." Any decision concerning the introduction of pay-TV in Canada, then, must be taken not only with regard to the clash of interests among those seeking to promote or to prohibit pay-TV but also in more strategic terms as one possible element in any prospective industrial strategy.

The Choice Between Monopoly and Competition

The pay-TV issue raises once again the question of choosing between monopoly and competition in the provision of this new service and, in this regard, follows a long-standing Canadian tradition as well as tying into a contemporary ideological debate.[4] As is well known, Canada has demonstrated a distinct preference over the years for public enterprise emphasizing not only monopoly or oligopoly but also state control in the provision of important services. Nowhere is this more evident than in the area of broadcasting, where public as well as private enterprise is mandated by statute and where regulation significantly affects the operation of the communications system. The introduction of pay-TV, however, comes at a time when there is considerable pressure for competition, deregulation, and privatization in Canada and elsewhere. The monopoly versus competition debate is carried out on several levels. On one level, the debate proceeds in terms of different models advanced by various parties involved with the issue — models that range from a public monopoly over the provision of pay-TV through a private monopoly/mixed competition arrangement to something approximating free competition at least with regard to the supply of pay-TV service. On another level, the debate concerns the extent to which alternative technologies for the distribution of pay-TV service should be tolerated and perhaps encouraged, and what overall configuration involving different mixes of national and regional pay-TV service should be licensed. Finally, there are a variety of other matters relating to the use of pay-TV for purposes of cross-subsidizing other aspects of Canadian broadcasting, possible restrictions on ownership and control of pay-TV by established elements within the communications industry, and what kind of anti-siphoning and Canadian content requirements are to be imposed on licensees, all of which will bear directly or indirectly on the balance of monopoly and competitive forces in the emerging pay-TV industry.

Contention Within and Between Governments

In quite a different way, the pay-TV issue highlights the difficulty of regulatory policy making within a federal and parliamentary system such as Canada. As with other areas of public policy, the provincial governments dispute the federal government's claim to jurisdiction and control over pay-TV and argue essentially that pay-TV involves an intra-provincial closed-circuit arrangement that should be under their regulatory authority. Federal-provincial conflict over pay-TV as one aspect of communications policy, particularly as it involves Quebec, Saskatchewan, Ontario, and British Colombia, has become at times quite intense, and efforts to resolve the matter have foundered on the priority to be given to the pay-TV issue, the sometime contradictory stance taken by the federal government and its regulatory agency, and appropriate ways of transferring regulatory authority over certain aspects of the service to the provinces. Within the federal government itself, there has also been contention among government departments, Crown corporations, and the appropriate regulatory agency over their proper roles in policy making with regard to the introduction of pay-TV in Canada. Interest in pay-TV has been expressed by at least two federal departments — the Department of Communications and the Secretary of State — concerned primarily and respectively with the technical and cultural aspects of the issue. As well, there are Crown corporations like the Canadian Broadcasting Corporation among others that operate at arm's length from government but have a strong interest in influencing the federal position and the relevant regulatory agency — the Canadian Radio-television and Telecommunications Commission — charged with the task of reviewing the various proposals but mandated to consider them primarily in terms of its statutory authority. In the Cabinet/parliamentary system, however, the final decision rests with the federal Cabinet and the responsible minister whose approval for the introduction of pay-TV must eventually be given. Thus, the difficulties of policy making within a federal and parliamentary context come together most dramatically in the potentially uncomfortable role played by the federal regulatory agency — caught up in the conflict between federal and provincial governments, liable to being overruled by the federal Cabinet and the responsible minister, and yet responsible for carrying out its statutory mandate in the best way it can.[5]

Regulatory Decision Making in the Public Interest

Lastly, the pay-TV issue sets in sharp relief some of the major problems of regulatory decision making in the public interest in a country as diverse as Canada. Governments in Canada have always been quick to choose regulation as a governing instrument and to justify it not only on its economic or social merits but also by some vague notion of the public interest.[6] What actually constitutes the public interest is never easy to determine and how effective regulation is as one of a number of governing instruments are most difficult questions that manifest themselves in a variety of ways when examining the pay-TV issue. When, if ever, does public demand for pay-TV become not only the necessary but also the sufficient condition for policy makers to decide upon its introduction? To what extent should one group be restrained from introducing the service in order to protect vested interests within an established industry? What steps should be taken to ensure that the introduction of pay-TV will not result in any significant shift of programming away from commercial television onto the new service? How can regional desires be reconciled to national purpose in the operation of pay-TV? How should pay-TV as one new information technology be regulated so as to set a proper pattern for the introduction of other similar technology in the future? All of these questions, and many others, lie at the heart of any determination of appropriate regulatory action in the public interest and must bear directly on any decision to introduce pay-TV in Canada.

Thus the introduction of pay-TV in Canada raises themes and variations that go well beyond the immediate issue at hand and have deeper significance for Canadian public policy. It is not merely a scramble among entrepreneurs for the right to market the new service, nor is it primarily a conflict between and within governments over who will control its introduction. These elements are certainly present, but there are also vital matters of substance that bear upon the pay-TV decision. The pay-TV issue raises a number of important themes of both Canadian and contemporary significance. In proceeding to explore the development of the pay-TV plot as it takes shape during the 1970s and early 1980s, it is important that these broader themes and variations be kept in mind.

Development of the Plot

Act I — Emergence of the Conflict

Act I begins with a flashback to 1960 when the first stirrings of interest in pay-TV became evident in Canada. While initial and essentially local pay-TV experiments in the United States date back to the early 1950s, International Telemeter, a subsidiary of Famous Players Corporation and Paramount Pictures Corporation in the United States, began in 1960 to provide the first Canadian pay-TV service to up to 6 000 subscribers in Etobicoke, Ontario. The service was distributed to the home by coaxial cable and followed a rudimentary pay-per-programme format whereby subscribers deposited coins in a box atop their television sets in order to receive its three available channels. In operation until 1965, the International Telemeter "experiment" offered a mix of not-so-new movies, sporting events, and special presentations, was not particularly popular with its subscribers whether because of its content or format, and ended up losing $3 million before it eventually folded.[7] By way of contrast, the pay-TV phenomenon proved somewhat more successful in the United States where the Federal Communications Commission approved over-the-air pay-TV as early as 1962, and pay-TV distributed by cable became available in selected localities after 1969, although in both cases on a pay-per-channel rather than a pay-per-programme basis.[8]

In Canada, any full-scale introduction of pay-TV would eventually require the explicit approval of what was then the Canadian Radio-Television Commission (CRTC) and at least tacit acceptance on the part of two other important federal government bodies — the Department of Communications (DOC) and the Canadian Broadcasting Corporation (CBC). Under the Broadcasting Act of 1968, the CRTC was established as a strengthened and more independent regulatory agency and charged with the task of putting into effect a set of broad policy objectives for Canadian broadcasting. It held the power to issue licences for all "broadcast undertakings" as well as to make regulations concerning programs, advertising, political broadcasts, network affiliation, licence fees, reporting procedures and "respecting such other matters as it deems necessary for the furtherance of its objects."[9] Among the specific policy objectives set down by Parliament are the following:

> (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute *a single system . . . comprising public and private elements*;
>
> (b) the Canadian broadcasting system should be *effectively owned and controlled by Canadians* so as to safeguard . . . the cultural, political, social and economic fabric of Canada;
>
> . . .
>
> (d) . . . programming provided by the Canadian broadcasting system should be *varied and comprehensive* . . . [and] . . . should be of *high standard, using predominantly Canadian creative and other resources*;
>
> (e) *all Canadians are entitled to broadcasting service* in English and French as public funds become available;
>
> . . .
>
> (h) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved *in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service*.[10]

In exercising its powers and putting these objectives into effect, the new CRTC, which evolved out of the Board of Broadcast Governors but took over responsibility for cable television licensing from the Department of Transport, soon confronted the pay-TV issue as it struggled, under the able chairmanship of Pierre Juneau, to integrate cable with broadcasting and to impose some direction on the whole system through its efforts to regulate such matters as foreign divestiture, cross-ownership, and Canadian content.[11] For its part, the Department of Communications, also newly created in 1969 and primarily concerned with communications from a technological standpoint, soon became engaged in "a comprehensive study . . . of the present state and future prospects of telecommunications in Canada," during the course of which pay-TV emerged as one of several "broadband" services that might become desirable as the result of continuing technology advance.[12] As well, the CBC, responsible to Parliament through the Secretary of State but a most influential and independent force to be reckoned with, was also becoming aware of pay-TV as a potential threat to Canadian broadcasting associated with the rapid expansion of cable television.[13]

At the same time that the federal government was getting its house in order, the cable industry in Canada was booming and the introduction of pay-TV became an increasingly attractive proposition for some of its more aggressive entrepreneurs. Over the previous decade or so, cable distribution systems had sprung up on a local basis primarily in Ontario, British Columbia, and Quebec and, as of 1970, some four hundred systems were in operation serving just under one million subscribers or 17 per cent of all Canadian households with television. Growth within the industry was rapid with one study done in the late 1960s finding that the use of cable in Canada was growing nationally at an average of 3.5 to 4.0 per cent per month.[14] Cable entrepreneurs like Rogers Cable Television of Toronto under the leadership of Ted Rogers, Maclean-Hunter Ltd. with a string of cable operations in Ontario as well as its broadcasting and other interests, and Premier Cablevision, which assumed control of previously American-owned cable operations in British Columbia, all were representative of the dynamic and increasingly concentrated cable industry emerging in Canada.[15]

Nevertheless, the industry faced obstacles as well as opportunities, and this situation is well exemplified by their growing interest in the introduction of pay-TV service. In 1970, one proposal was made to the CRTC by broadcasting interests to provide over-the-air pay-TV service along with American television signals to the underserved cities of Edmonton, Regina, and Saskatoon, but this was summarily rejected as not conforming to the objectives of the Broadcasting Act.[16] In 1972, several proposals were made by cable operators in Toronto and Vancouver to provide pay-per-channel service to their subscribers featuring movies and some specialized programming, but the CRTC deferred consideration of these applications because no general policy had yet been established.[17] In October 1972, however, the CRTC issued its first public announcement on pay-TV in which it recognized that such services could play "a significant role in the development of the Canadian broadcasting system" but "their precise potential for service to the public and their effect on television broadcasting and cable television services has not yet been determined." It also went on to indicate that the Commission would undertake a thorough examination of the pay-TV issue and also consider "experimental proposals . . .

if in the opinion of the Commission they are likely to contribute to the achievement of established broadcasting policies."[18]

Between 1973 and 1975, other developments were taking place that were to have important implications for the introduction of pay-TV in Canada. For one thing, the federal government initiated a series of consultations with the provinces aimed at evolving "a new national communications policy," but these discussions soon reached an impasse with the two levels of government holding firm to opposing positions. While pay-TV did not arise directly as an issue in these discussions, it began to emerge as one consideration behind the "common front" forged by the provincial governments against Ottawa.[19] Secondly, both the federal Department of Communications and the Secretary of State became increasingly aware of the potential as well as the problems of pay-TV in Canada. The former began to see the way in which pay-TV could contribute to the viability and expansion of the cable industry in Canada while the latter became aware of how pay-TV could be used to support the independent programme production industry.[20] Both the problems and the potential of pay-TV were recognized by Gérard Pelletier, then Minister of Communications but also formerly Secretary of State, when he warned that "pay-TV as presently conceived is little more than a pay-as-you-go double of existing television services" and an unacceptable way for "the 'cream' [to] be skimmed from the present broadcasting system."[21] Thirdly, Canadian broadcasters and common carriers, with well-established positions to be defended within the communications industry, were also becoming aware of the real threats posed by pay-TV to their respective interests. The CBC tended to view the introduction of pay-TV by the cable companies as just another breach in the already weakening dike holding back a flood of American programming while the private broadcasters were simply more mercenary in seeing it more as imperilling their livelihood and threatening the economic viability of their industry.[22] As well, the telephone companies like Bell Canada were also becoming vaguely aware of pay-TV as a first step by the cable operators towards the provision of other non-broadcast services and an attempt "to usurp functions which should remain the prerogatives of the common carriers."[23] Last but not of least importance, public demand for pay-TV service did not seem particularly great. As of 1975, there was precious little evidence that many Canadians were interested in subscribing to pay-TV service.

Meanwhile, following their initial rebuff at the hands of the CRTC, the cable industry moved on several fronts to evade the direct impact of that announcement and to press for the early introduction of pay-TV in Canada. In 1973, several cable operators applied to the CRTC to run feature movies on their community channels, but the CRTC denied such carriage on the grounds that this activity raised many of the same issues as pay-TV.[24] In 1975, Rogers Telecommunications acquired an existing closed-circuit hotel pay-TV system supplying feature movies to major Toronto hotels and, a year later, Premier Cablevision began operating a similar system in Vancouver, both of which operated on a "stand-alone" basis and initially unlicensed by the CRTC.[25] Also in 1975, All-View Network I Inc., controlled ultimately by Baton Broadcasting Ltd., began to provide what amounted to closed-circuit pay-TV service by means of an unlicensed "master antenna television system" (MATV) to a major Toronto apartment complex, thereby challenging the territorial monopoly of the licensed cable operator in that area and raising the spectre of its extension to other high-density markets.[26] Finally, in 1975, a consortium of major cable operators across the country formed the Cable Satellite Network to take advantage of the availability of excess satellite capacity and to give themselves for the first time a network capability in the distribution of pay-TV and other broadcast services.[27] All of these moves testify to the growing interest on the part of the cable industry in introducing pay-TV into Canada.

By 1975, pressure was building on the CRTC — now under the chairmanship of Harry Boyle — to re-evaluate its position on pay-TV and, in February of that year, the Commission rose to the challenge by issuing an important position paper on the subject. It set forth the view that "the development of technology, and of the programming choices technology is able to provide, not be permitted to overwhelm the off-air broadcasting system" and proceeded to identify its three main areas of concern: "fragmentation of audiences on which Canadian television systems depend"; the use of pay-TV as "a vehicle to further the production and exhibition of Canadian material"; and the danger that existing programming would be "siphoned away to a service which is available to those who are able and willing to pay a fee."[28] In its commentary, the CRTC went on to indicate a definite preference for cable distribution of any future pay-TV service, its willingness to consider a variety of possible pay-TV operators including, but not restricted to, the cable industry, the likelihood that not less that 15 per cent of gross revenues be devoted to Canadian production, and to invite interested parties to comment on these and other matters pertaining to the possible introduction of pay-TV in Canada. By way of conclusion, however, the CRTC hinted at its continuing scepticism about pay-TV and put forward in somewhat ungainly form what it considered to be the basic question: "Can a service be developed, devoid of commercial content and without interruption of program material, which will be of sufficient interest to the public to be marketable and financially sound and at the same time provide a new impetus to the growth of the Canadian program production industries?"[29] The fundamental paradox underlying the introduction of pay-TV in Canada had for the first time been articulated.

At public hearings held in June 1975, some forty submissions were considered. As would be expected, the cable operators were most favourable towards the immediate introduction of pay-TV in Canada. Out of fourteen cable industry briefs, one in particular — presented jointly by Canadian Cable Systems Ltd., Premier Cablevision, and Rogers Cable TV — highlighted the extent to which cable distribution systems were the obvious delivery system for pay-TV, proposed that the service be marketed by cable operators who purchase the complete package from a national pay-TV network that in turn buys programmes from independent producers and elsewhere, and fully endorsed the suggestion that 15 per cent of gross revenues go to the production and acquisition of Canadian programmes.[30] Other interested parties were not so favourably inclined towards the introduction of pay-TV. The broadcasters — both public and private — argued that its introduction was premature and would have a harmful effect on broadcasting. Likewise, the programme production industry was also sceptical but concluded that if pay-TV was to be introduced, it should be done in such a way as to maximize the financial benefits to their industry and to increase exhibition opportunities. Lastly, various public interest groups — the Consumers' Association of Canada, the Canadian Broadcasting League, and others — submitted briefs that showed little enthusiasm for the introduction of a Canadian pay-TV service.[31]

The matter was settled for the time being when the CRTC came out with a series of policy statements on cable television issues in December 1975. After reviewing the results of the public hearings, the Commission indicated that "some form of pay television is highly probable in the future and has the potential of becoming a major new element in the broadcasting system." It suggested that "if pay television service is to be brought to the public, then over-the-air broadcasters, program producers, and cable television licensees must work together to effect an integrated use of the broadcasting system to assist Canadian production." It noted that "the Canadian broadcasting system is presently in the process of adjusting to a number of new policies and developments . . . and should have the opportunity to adapt to and absorb all the present policies and developments free from the potential challenge of the widespread introduction of pay television." The conclusion was anticlimactic: "it is premature to introduce a comprehensive pay television service into Canada at this time" but the CRTC will "continue to study the means by which pay television can be introduced in a manner consistent with the preservation and development of the existing broadcasting system."[32] With this announcement, the curtain was finally brought down on Act I of the pay-TV melodrama.

Act II — Expansion and Intensification of the Conflict

As Act II opens early in 1976, we find the cable industry, as the major protagonist in the piece, disappointed but by no means defeated and other possible players quietly reassessing their positions on pay-TV. Onto the stage strides the recently appointed Minister of Communications, Madame Jeanne Sauvé, to make her now famous "pay-TV is inevitable" speech. Addressing the Canadian Cable Television Association in June of that year, she described the introduction of pay-TV in Canada as "most exciting because of its potential to improve programming and real program choice" and "a watershed in the development of broadcasting, with major structural implications for the entire system."[33] Her argument focused specifically on the need to support the Canadian programme production industry while acknowledging that such "negative aspects" of pay-TV as "siphoning," fragmentation," and "lowest common denominator programming" would have to be controlled. To this end, she suggested three key objectives for pay-TV in Canada: first, "it must provide a range of programming which does not duplicate that now offered by broadcasters and must do so without siphoning programs from the broadcasting system"; secondly, "it must ensure the production of high-quality Canadian programs that Canadians will watch"; thirdly, "it must ensure that programs are produced in Canada for international sale."[34] Finally, the minister indicated that she had asked the CRTC once again to call for submissions and to hold public hearings on "the structural development of pay television and its integration into the Canadian broadcasting system" and that she would be writing to provincial ministers of communications for their views and comments.[35]

Beyond that, the minister went on to reveal something about her basic thinking, and that of the federal Department of Communications, on an appropriate structure for the introduction of pay-TV. She asserted that "continued federal regulation of the broadcasting system, including the regulation of pay television, is a crucial factor in the coherent and orderly provision of program services to the entire Canadian viewing public." She acknowledged that "we must concede the obvious advantages in the delivery of pay-TV by cable." As well, she noted that "it does appear that initially the pay-per-channel approach to pay-tv will probably be necessary for the generation of sufficient revenues to make the system financially stable." And finally, she suggested that "a pay television network . . . [owned and operated independently from existing off-air broadcasters or cable interests] . . . could provide particular benefits for each component of the industry and could create a Canadian distributor of programs, an entity which does not now exist."[36]

Looking somewhat embarrassed by this turn of events, the chairman of the CRTC, Harry Boyle, delivered his own speech acknowledging the minister's request while graciously but warily emphasizing the statutory mandate of the Commission to protect and strengthen the broadcasting system. He began by detailing the rapid growth of cable television in Canada and the challenge posed by advancing communications technology before revising and reformulating in somewhat more nationalist tones the earlier concern expressed by the CRTC in 1975: "will pay-tv in Canada be another conduit for siphoning off more of our resources for foreign production industries or will it include reasonable incentives for Canadian production?"[37] With some reservation he announced that the CRTC would call for "comments on the issue of the structure of a pay-television network operation" to be received by 1 September 1976, following which "a policy decision on the form and structure of such an organization" would be taken by the minister and her Cabinet colleagues, and from there the Commission could "proceed by normal procedures to establish regulatory guidelines and call for formal license applications" to be announced "before the end of this year."[38]

By posing the issue in those terms without seeking directly to answer it, the chairman of the CRTC, like the minister before him, set the matter squarely in terms of American cultural dominance but revealed something about his own and the Commission's more cautious views of the pay-TV issue. He chose to interpret the minister's remarks "as the beginnings of a national policy of 'cultural security' for Canada" and something more than "a mere broadening of entertainment choice for subscribers." He noted that the issue as posed "transcends the normal administration of the Broadcasting Act of 1968 because the structure of the programme service to pay-tv will have an effect not only on cable operators and off-air broadcasters but on the whole range of creative programme production resources of Canada." He acknowledged that the technology for pay-TV "is there to be introduced . . . has a seduction of its own . . . [and] . . . there is . . . no value in a sterile demonstration against technical progress." In the final analysis, however, "to allow an opportunity to slip by to convert technical systems to a national purpose with a conscious and dedicated restructuring of the national broadcasting and cultural system, would be inexcusable."[39] Clearly, the chairman of the CRTC looked at the issue somewhat differently than did the Minister of Communications.

How can this dramatic intervention by the minister and the apparent volte-face by the CRTC be explained? At least three factors come immediately to the fore. First of all, there was the demonstration effect occasioned by the rapid growth of pay-TV in the United States and its immediate implications for Canada. After 1972, pay-TV became increasingly available in the United States by cable as well as over-the-air distribution. By 1976, almost one million Americans were subscribing to pay-TV and that figure was to double on an annual basis throughout the rest of the 1970s. Moreover, Home Box Office, a subsidiary of Time-Life Inc., had quickly emerged as the most successful pay-TV distributor controlling up to 60 per cent of the Amercian market. The availability of pay-TV became a major incentive behind the extension of cable distribution systems into major American urban markets that were only opening up in the late 1970s. At the same time, the shift from microwave distribution to satellite transmission and the lifting of rules against programme siphoning allowed cable-TV to become virtually another national network.[40] The implications for Canada were several. First of all, pressure on the part of the cable industry in Canada to introduce pay-TV became intense even though the situation in the two countries was quite different, with cable penetration roles already approaching 50 per cent and the Canadian industry already quite mature and looking for new investment opportunities. Secondly, the introduction of pay-TV in Canada would undoubtedly bring with it the threat of more American programming, but this could be controlled through appropriate Canadian content regulations and even turned to possible advantage through diversion of revenues to the Canadian programme production industry. Thirdly, stimulation of the domestic programme production industry was most opportune because of the high expected demand for quality programming to serve an expanding and increasingly competitive North American market. Fourthly, the use of excess Canadian satellite capacity for the distribution of pay-TV and other broadcasting services was becoming increasingly attractive as a way of extending additional programming to underserved areas of the country and providing a Canadian alternative to unlicensed reception of American pay-TV services.[41] For all these reasons, the rapid growth of pay-TV in the United States by 1976 and afterwards exerted an important influence on the formation of Canadian government policy.

Likewise, federal-provincial conflict over pay-TV as one aspect of communications policy also became an increasingly influential factor in Canadian policy making. In negotiations with the provincial governments on communications policy after 1973, the federal government operated on the assumption that pay-TV would most likely be introduced in Canada by the cable industry and would thus come under federal authority as part of its responsibility for the broadcasting system. Many provincial governments, however, contested federal jurisdiction over cable television and continued to challenge, directly or indirectly, the federal position on pay-TV. For example, the government of Ontario licensed the All-View operation providing closed-circuit pay-TV to a Toronto apartment complex under its theatres legislation and effectively sanctioned the company's evasion of federal regulation. Moreover, in Saskatchewan, Sask Tel — the provincially owned and regulated common carrier — was becoming involved in the Cooperative Programming Network (CPN) to provide up to five channels of entertainment programming obtained mostly from American pay-TV distributors to households in several areas of the province. In addition, the Quebec government had for some time licensed cable operators under its Public Services Board (Régie des services publics) to provide service directly in opposition to federally licensed cable operators, and the provincial government was becoming increasingly interested in moving into the area of pay-TV.[42] The provincial government position on pay-TV was straightforward. They argued that pay-TV, like cable television, was essentially an intraprovincial service and that provincial governments should control the delivery of that service within their boundaries. As well, many had clear views as to how a pay-TV operation should operate and what particular purposes it should serve within the province. Even more importantly, the provincial governments were also becoming aware of the fact that pay-TV was only the first of a series of premium services, non-broadcast as well as broadcast, over which they would like control.[43] Faced with this provincial challenge to federal authority in the communications field, quick action by the CRTC to introduce pay-TV in Canada would undoubtedly buttress the federal position.

Finally, there was the continuing pressure for pay-TV coming from the cable industry in Canada and its various promoters. Cable entrepreneurs like Ted Rogers took the lead in pressing for pay-TV as necessary for the future health of the industry, and the Canadian Cable Television Association (CCTA) — the industry's trade association — also became extensively involved in pressing the federal government for the quick introduction of pay-TV in Canada.[44] Their case turned on several points. The industry argued that "pay-TV must be seen as cable's unique contribution to a healthy, growing Canadian broadcasting system." It pointed out that the cable industry in Canada was reaching a turning point, having achieved high levels of penetration in many of its market areas and with unused capacity and profits readily available for expansion. It presented pay-TV not only as a vehicle for movies, sports, and special presentations but also as the only feasible way of providing more specialized programming not available on commercial television. As well, it suggested that pay-TV offered the cable industry its first real opportunity to participate in programming as well as delivery and to play an important role in the emergence of a new Canadian pay-TV industry. Not all of the cable industry's pitch, however, was quite so positive. It complained about the rapid growth of pay-TV in the United States that threatened to spill over into Canada and unlicensed domestic pay-TV that provided unfair competition to the cable industry in specific markets. It hinted that the cable industry might have to explore the possibility of introducing pay-TV under provincial jurisdiction. And it indicated its longer-term interest in providing a broad range of premium services, non-broadcast as well as broadcast, that would make the cable industry into a diversified broadband alternative to the existing common carriers.[45] Many of these points registered squarely with the Minister of Communications and came to be reflected in her dramatic intervention on the pay-TV issue.

In response to the call for submissions and the prospect of public hearings, there was considerable jockeying among parties interested in the pay-TV issue. Following up on its recent joint submission, major figures in the cable industry formed a new company, Pay Television Network (PTN), to develop a firm proposal for the introduction of pay-TV in Canada and, if possible, to pursue co-operation with broadcasters and programme producers.[46] For their part, the broadcasters also began separately to re-examine their position on pay-TV, with the CTV Network exploring the possibility of establishing its own pay-TV production company and the CBC developing its proposal for CBC-2 as an additional programming service to be offered via cable, although neither the public nor the private broadcasters were yet supportive of the introduction of pay-TV.[47] Likewise, the programme production industry in Canada was also ambivalent about pay-TV and its benefits, with some independent producers ready to support its introduction as a way of generating funds for the industry and securing exhibition for its products, while others were more sceptical about the extent to which the domestic production industry would benefit.[48] In addition, more indirectly affected parties like the common carriers and the advertising industry began to show concern about pay-TV, the former because of the possibility that the cable industry might eventually move into the provision of other premium services and the latter because of the presumably commercial-free nature of pay-TV service that would detract from their opportunity to get their message across to the viewing audience.[49] Finally, various public interest groups including the Consumers' Association of Canada, the trade union movement, and the Canadian Broadcasting League, among others, took positions in opposition to pay-TV as unwarranted in terms of consumer demand, deceptive in terms of its benefits to the programme production industry, and a major threat to Canadian culture.[50] Even before any public hearing could take place, it was clear that the scramble for pay-TV would be an intense one.

Within the federal government, support for the introduction of pay-TV in Canada was also mixed. To be sure, the Department of Communications was basically in support of pay-TV, although there were indications that it favoured a public monopoly to introduce pay-TV on a national basis and that it was sympathetic to arguments in favour of a pay-per-programme format.[51] The Secretary of State, however, seemed much less favourable to the introduction of pay-TV in Canada, indicating that he remained to be convinced of the benefits to Canadian broadcasting and that perhaps a royal commission on pay-TV and other broadcasting issues might be warranted.[52] Likewise, the Canadian Film Development Corporation, busily engaged in the financing of a clutch of made-in-Canada movies for international as well as domestic consumption, viewed the prospect of a new pay-TV as reinforcing its primary orientation. The National Film Board, however, was more cautious about the impact of pay-TV and saw little benefit from its particular perspective.[53] Most important of all, the CRTC continued to show little enthusiasm for pay-TV, and conflict between the Commission and the Department of Communications over pay-TV among other issues became publicly evident. When the CRTC eventually got around to examining the pay-TV submissions received by the fall of 1976, it concluded that few of the 105 submissions had responded to certain fundamental questions concerning the format and functioning of any proposed pay-TV agency, and postponed the public hearing until June 1977 when revised and updated submissions could be considered.[54] The timetable for introducing pay-TV in Canada would clearly have to be changed.

During 1977 and 1978, conflict between the federal and provincial governments over pay-TV became more and more intense. The federal government was able to gain some limited acknowledgement of its position when it signed an agreement with Manitoba late in 1976 wherein the provincial government was delegated authority over cable distribution systems within the province, but federal regulation of the broadcasting system, and pay-TV specifically, was confirmed.[55] On the other hand, the Saskatchewan government moved in 1977 to pass legislation asserting jurisdiction over closed-circuit, intraprovincial cable systems. This legislation, based upon undisputed ownership and control of the telephone system, allowed the provincial government effectively to exempt its pay-TV venture from supervision by the federal regulatory authority.[56] As well, in Quebec, the provincial government produced a position paper on pay-TV during 1977 that tied the prospective new service into its overall cultural language policies. Shortly thereafter, it also promulgated regulations that provided for regulation of pay-TV under the Public Services Board and the establishment of a single, monopolistic, non-profit agency to be the exclusive supplier of pay-TV programming to local exhibitors.[57] Finally, late in 1977, the jurisdictional issue came to be clarified, though not necessarily resolved, when the Supreme Court rendered its decision in two important cases relating to cable television. By six to three decisions, the court upheld the CRTC's authority to order deletion of commercial messages broadcast by American border stations and rejected the Quebec government's claim to license cable operations within the province. In so doing, the court upheld the treatment of cable as an extension of broadcasting and as part of an integrated communications system.[58] However, two points about the decision should be noted: first, the three Quebec justices were in dissent and their opinion espoused a more provincialist interpretation of the issue; and secondly, in neither case was the matter of closed-circuit cable operations involving the use of non-broadcast signals treated.

By the time that the June 1977 public hearings were held, the CRTC had to consider some 140 submissions coming from a wide range of individuals, groups, and other governments, and 26 of these made actual presentations to the Commission.[59] Over one third of the submissions came from cable, broadcaster, programme producer, and carrier interests anticipating some direct involvement in any pay-TV service and the rest came from other commercial groups, public interest groups, three provincial governments, and a substantial number of private individuals. Summarizing the submissions and representations made at the public hearing, the CRTC came to the following findings: the strongest support for the introduction of pay-TV came from the cable industry, especially in the form of its PTN proposal; opposition to pay-TV came primarily from the broadcasters and public interest groups on the grounds that it would undermine the existing broadcasting system; both the cable industry and the broadcasters favoured an organizational structure for pay-TV consistent with their own interests, but there was considerable support for mixed control and for the establishment of a public corporation; the need for Canadian content and anti-siphoning regulations was widely expressed; there was a clear preference for a "pay-per-programme" format, but the cable industry was strongly in support of the "pay-per-channel" format; most of the submissions expected that the overall impact of pay-TV on the broadcasting system was negative.[60] In moving to determine its recommendations, the CRTC indicated that these findings, along with evidence of public demand for pay-TV and consistency with the objectives of the Broadcasting Act, would be primary criteria behind its decision.

In March 1978, the CRTC issued its long-awaited *Report on Pay-Television*. After reviewing the development of the issue and detailing the results of the public hearings, the Commission concluded that "it is not possible on the basis of the submissions and the Commission's further analysis to recommend the introduction of pay-television at this time."[61] The underlying rationale for the Commission's decision, while not always stated explicitly, can for the most part be pieced together. Close analysis of the submissions and representations made to the Commission reveals an overwhelming degree of opposition to the introduction of pay-TV and strong support only from the cable industry and a few programme producers who would benefit directly. As well, a national survey was conducted by the CRTC to obtain information on public knowledge and attitudes towards pay-TV, and the results showed that introduction of the service "is not considered 'essential' for [cable] subscribers nor do they reveal a compelling demand for this potential new programming service." Moreover, the Commission was strongly influenced by evidence from many quarters that none of the existing pay-TV proposals, following primarily the American pay-TV model but acknowledging a substantial degree of monopoly control and diversion of revenues to Canadian programme production, "achieved an acceptable level of commitment to present broadcasting objectives and requirements." Finally, the Commission became more and more persuaded of the need for "planning of a national policy on pay-television prior to its introduction" and, rather than give premature approval, decided that it would be better at that time to articulate a set of "objectives and operational guidelines which should influence policy planning for the introduction of a future pay-television service."[62] Among the objectives and guide-lines specified were the following: a national service providing predominantly Canadian programming in both English and French; a single agency to act as distributor and to acquire programming; a private company with a diverse board of directors as the preferred corporate form; a "promise of performance" involving a 50 per cent Canadian content rule and at least 35 per cent of gross revenues directed to Canadian programme production, distribution by satellite or whatever is the most cost-effective method and no absolute preference for cable in the delivery of pay-TV; an open and competitive bidding system for exhibition licences; and the likelihood of a pay-per-channel format.[63] Whether treated as foresight or delay, the CRTC report was making it clear that what is "inevitable" is not necessarily imminent.

Reaction to the CRTC report came quickly and from several quarters. As might be expected, the swiftest and most predictable response was from the cable operators who had been pressing so hard for the introduction of pay-TV in Canada. Major figures in the cable industry said that they were "disappointed if not surprised" and described the report as "a depressing document."[64] There were threats that the cable industry might simply go ahead on its own and introduce pay-TV without government approval. There were hints that they might explore ways of introducing pay-TV under provincial jurisdiction. There were rejections of the notion that no public demand existed for pay-TV in Canada. At the same time, the cable industry found a few bright spots in the report's advocacy of a single national agency for pay-TV not unlike that proposed by PTN and the acceptance of private-sector control, although it did object to the Canadian content specifications as unrealistic. Following that initial reaction, the cable industry realized that it had little alternative but to keep up the pressure on the federal government for speedy introduction of pay-TV and to seek broader support among other interests affected by the issue.[65] In February 1979, the CCTA commissioned its own survey of public interest in pay-TV and reported considerably higher demand than the CRTC found. As well, the cable industry continued to push the PTN proposal and to indicate its willingness to work with broadcasters and programme producers in introducing the service as quickly as possible.[66]

On the federal-provincial front, the initial response came at the Federal-Provincial Conference of Communications Ministers, which met in Charlottetown later in March 1978. The introduction of pay-TV headed the list of items discussed and the meeting gave the provincial ministers a most opportune occasion to press their demands.[67] Several provincial governments expressed concern about the underlying conception and go-slow approach adopted by the CRTC. Quebec, Saskatchewan, and British Columbia all pointed to the exclusion of closed-circuit cable distribution systems from the recent Supreme Court decisions and asserted that the introduction of pay-TV should fall under provincial jurisdiction and control. Entering the fray directly for the first time, Ontario tended to see pay-TV as the forerunner of a variety of new services and as a way of opening up wide opportunities for consumer choice and entrepreneurial activity, but it was more disposed to federal-provincial co-operation than confrontation.[68] Each of the provincial governments came to the conference with its own set of objectives for pay-TV within its province, often quite different from each other and certainly at odds with those of the federal government and the CRTC. However, the federal government adopted quite an accommodating posture towards cable television and the pay-TV issue and, in the final analysis, it was decided that the federal government "would proceed to develop, in conjunction with the provinces that wish to do so, a model for the introduction of pay-TV in Canada."[69] As well, in June 1978, the federal government indicated its willingness, as part of a wide-ranging set of constitutional proposals, to examine possible changes in communications jurisdiction and intensive work began on a constitutional amendment involving concurrent power over cable distribution systems.[70]

In the wake of the CRTC report, the federal government also began to reassess its own position on the introduction of pay-TV in Canada. The Department of Communications and its minister — still Jeanne Sauvé — started to treat pay-TV not only in cultural terms but also as one of a complex of issues spawned by rapid advances in communications technology. This became particularly evident in the link that came to be made between pay-TV and the use of satellites and a general downplaying of pay-TV *vis-à-vis* other communications issues.[71] In November 1978, the minister appointed a Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, and one of its major terms of reference was "the framework and timing for the introduction of pay-television nationally."[72] When the Consultative Committee brought in its report in April 1979, it concurred with the CRTC in finding "no evidence that there is at present any substantial demand for the early introduction of pay-TV" but did recommend "a strategic policy for its eventual introduction," expected "two or three years hence." On specific aspects of pay-TV, it strongly favoured the pay-per-programme format despite the opposition of the cable companies as well as "appropriate Canadian-content rules" and "a levy on profits from pay-TV to be used for Canadian programming."[73] At the same time, the federal Department of Communications was becoming increasingly interested in encouraging the use of unused satellite capacity to extend service to remote and underserved areas of the country. To this end, the department moved to loosen its requirements for earth station ownership and, in March 1979, invited cable operators, broadcasters, and common carriers to a "satellite package conference" to discuss the establishment of a nation-wide distribution system using satellites. Such a system would package existing network channels, specialized programming, House of Commons proceedings, and eventually a pay-TV service, thus allowing for quick extension of service to remote and underserved areas as well as providing a Canadian alternative to unlicensed reception of American pay-TV signals.[74] Before the link between pay-TV and the use of satellites could be clearly drawn, however, fate intervened in the form of the May 1979 general election, and it seemed that it would fall to a new government to proceed with the introduction of pay-TV in Canada.

Act III — Towards a Resolution of the Conflict

Act III brings new characters on to the stage, but the same old problems and frustrations remain. Following the May 1979 election, David MacDonald became both Minister of Communications and Secretary of State in the Progressive Conservative government. The new minister thus exercised responsibility for each of the federal departments and all the major agencies — CBC, NFB, CFDC — interested in the evolving pay-TV issue. The minister moved slowly to formulate his own position on pay-TV and other communications issues, but he soon came to espouse the Department of Communication's emphasis on a link between pay-TV and satellites while also being persuaded as Secretary of State of the need for initiatives to support the domestic programme production industry.[75] Over at the

CRTC, changes were also taking place with considerable turnover among long-time commissioners and senior staff and, late in 1979, the appointment of John Meisel as the new chairman was only the most obvious manifestation of change. At the same time, the Commission began to explore the distinction between content and carriage as one way of organizing the pay-TV issue. Specifically, the provision of pay-TV service could be broken down into the three functions of programme production, distribution of one or more licensed programme packages, and licensed exhibition of the service, only the latter two of which would come under CRTC scrutiny.[76]

As well, the context within which the pay-TV issue presented itself was also changing. In the United States, the pay-TV industry was growing rapidly and increasingly posing a challenge to the commercial networks, as evidenced not only by the emerging oligopoly structure of pay-TV distribution and the extension of pay-cable into new markets, but also by the emergence of "super-stations" distributed nationally by satellite.[77] In Canada, unlicensed receiving dishes were beginning to spring up in northern and remote areas of the country to "pirate" American television signals for individual use or to serve local communities, and pay-TV operations in border cities were being planned to spill over into Canadian markets.[78] As well, the cable industry in Canada was becoming increasingly frustrated at the opportunities being lost for expansion and reinvestment of their profits in pay-TV and drawn more and more to put their money and expertise to work in the new cable markets opening up in major American cities.[79] Finally, the Canadian programme production industry, aware of the seeming success of the domestic film industry, was even stronger in its support of pay-TV as a way of stimulating Canadian production.[80] These new developments and changing circumstances were to bear heavily on subsequent decision making with regard to the introduction of pay-TV in Canada.

The federal government's position, as it was developed during 1979 by the new minister and the Department of Communications, grew out of previously emerging trends but also involved some important new initiatives. As they saw it, the basic problem arose from "the serious gap between the distribution capability of our telecommunications systems (including satellites) and the availability of programming from domestic producers" and was "compounded by the recent proliferation of television programming in the United States, mostly due to the satellite-to-cable mode, and the technical availability of these signals throughout most of Canada."[81] To deal with this complex problem, initiatives would be required in three areas: first, the orderly development of satellite television distribution as a way of extending broadcasting services; secondly, the introduction of a national pay-TV system distributed by satellite and with surplus revenues diverted to the programme production industry; thirdly, other measures to stimulate investment in the domestic industry and to initiate a comprehensive review of Canadian broadcasting. In anticipation of the upcoming Federal-Provincial Conference of Communications Ministers, a position paper was prepared outlining specific objectives and guide-lines for the satellite distribution of television programming and a national pay-TV system. As well, the CRTC was alerted that it would be asked to conduct a two-phased public hearing as soon as possible to consider both satellite distribution of television programming and pay-TV as parallel and related issues.[82] Finally, the minister unveiled two new proposals for discussion — the idea of a National Electronic Theatre whereby producers could exhibit programming on a pay-per-programme basis and the notion of a Cultural Industries Corporation to provide financing for the production of Canadian programming that might be shown on pay-TV.[83] Clearly, pay-TV was once again on the boards, although in a somewhat different form than previously.

In October 1979, when the Federal-Provincial Conference of Communications Ministers was held in Toronto, the federal government presented its position paper. The objectives and guide-lines set out for a national pay-TV system differed somewhat from the 1978 CRTC specification: a single pay-TV agency would control the acquisition and distribution of programming to local exhibitors; the agency could operate as "a mixed consortium operating on a non-profit basis" involving both federal and provincial governments as well as broadcasters, cable operators, and programme producers; satellite distribution was mentioned as the "preferred method of delivery"; potential local exhibitors would include not only cable operators but also off-the-air broadcasters and other local entrepreneurs who could be licensed either federally or provincially; and any surplus earned by the agency would be reinvested in the Canadian programme production industry.[84] The provincial governments reacted rather negatively to the federal government position. Many provincial governments attacked the notion of a monopoly national pay-TV agency and favoured a more competitive arrangement and specifically one that would allow for regional pay-TV agencies. The government of Ontario, in particular, was extremely critical of the slow progress made to date and pressed for the immediate introduction of pay-TV by the cable operators. Specifically, it objected to the "artificial linkage being forced between satellite service and pay-TV" and opposed the "negative, highly regulated and centralized approach" underlying the federal proposal.[85] For its part, Quebec chose not to get involved in matters of detail but continued to argue that pay-TV was a provincial responsibility and should be regulated by its Public Services Board.[86] In the final analysis, however, federal and provincial ministers agreed to refer the proposed objectives and guide-lines to their officials for further discussion "with a view to having them finalized within a month for the guidance of Ministers and regulators."[87]

For the cable industry, frustration with the process began to give way to very real concern that the introduction of pay-TV might well be taking a form that it found undesirable. A single national service had always been an underlying assumption of the cable industry, and talk of competition and alternate regional services was viewed as making any pay-TV venture less attractive. Likewise, a pay-per-programme format, however desirable it might be in terms of consumer choice, was rejected as involving investment in hardware at the expense of programming and retarding even more the eventual introduction of pay-TV in Canada. Canadian content requirements and percentages of gross revenues diverted to Canadian programming could be negotiable, but changes in the basic structure and format for pay-TV were more difficult.[88] In addition, the cable industry was being challenged in its efforts to introduce pay-TV by a growing number of potential rivals for any licences that might be granted. The CBC and CTV networks were openly exploring the possibility of putting forward a joint pay-TV proposal.[89] Baton Broadcasting and other private broadcasting companies were also showing interest in applying for licences to provide pay-TV service.[90] Even within the cable industry, some of the smaller cable operators not affiliated with PTN were attempting to position themselves so as to bite off part of the pay-TV market.[91] And finally, in the background, there was Bell Canada, not only with pay-per-programme technology already on the shelf but also ready and willing, for a price, to assist the cable industry or others in introducing pay-TV to Canada.[92]

Late in November 1979, the federal Minister of Communications formally requested that the CRTC conduct a two-phase public hearing early in 1980 to consider satellite distribution as a way of extending broadcasting services to northern and remote areas of the country in tandem with the quick and early introduction of pay-TV in Canada.[93] At the same time, the minister transmitted a revised version of the "objectives and guidelines" previously examined by his provincial counterparts, which specified one national distributor for pay-TV but allowed greater scope for "regional and local distributors to acquire programs and market them to local exhibitors" and placed more emphasis on pay-TV operating within a competitive environment and less on mechanisms to divert revenue to Canadian programming.[94] The CRTC responded promptly, affirmatively, but also carefully to the minister's request and made several interesting points about the Commission's view of the situation. First of all, the Commission indicated that the two-stage public hearing would deal with "how the number and variety of television services to northern and remote communities may best and most expeditiously be increased, and the issues of satellite distribution and pay-television are naturally expected to arise in that process." Secondly, there was confirmation that provincial representatives along with the chairman and any equal number of CRTC representatives would sit on the first phase of the public hearing process. Thirdly, following the committee's report to the CRTC, it would be up to the Commission to decide upon any second phase of public hearings on specific licence applications for pay-TV or other services.[95] Early in January 1980, the CRTC issued a public announcement establishing the committee under the chairmanship of Réal Therrien and calling for submissions from parties interested in extension of broadcasting services, satellite distribution, and pay-TV.[96]

The Therrien Committee received some 387 submissions, about half of which focused primarily on pay-TV, and held public hearings in Ottawa and elsewhere during March and April of 1980.[97] The pay-TV issue was clearly subordinated to the other issues under examination but nevertheless did receive much attention. Once again, the main proponents of pay-TV were the major cable operators grouped together under the aegis of PTN, which continued to press for a single national agency to distribute the service, privately operated but with broadened participation by private broadcasters, independent producers as well as themselves and, initially at least, offering a pay-per-channel service subject to a 30 per cent Canadian content requirement.[98] However, support for the quick introduction of pay-TV also came from a dissident group of smaller Ontario cable operators who opposed the national consortium and wanted a much simpler, locally oriented system, from private broadcasting interests seeking distribution of pay-TV over the air, from the Independent Producers Committee for Pay Television arguing the adoption of a "pay-per-package" format to serve specialized audiences, and not least of all from several of the provincial governments including Ontario, Saskatchewan, and Manitoba who fell in behind the revised "objectives and guidelines developed only recently by the federal and provincial governments."[99]

Opposition to the introduction of pay-TV came most forcefully from public and private broadcasters concerned about disruption of the present system but now grouped together in a loose alliance of the CBC, CTV, and the French-language TVA, which proposed an alternative national pay-TV distributor to be run on a non-profit basis by the broadcasters and with all excess revenues being channelled back to the programme production industry.[100] As well, the Joint Action Committee on Pay-Television and Satellite Policy — a new group comprising labour, consumer, and cultural interests — also opposed the existing pay-TV proposals and suggested the creation of a new Crown corporation called Telecanada, which would engage in programming and distribution subject to high Canadian content and revenue diversion requirements but would not get involved in programme production. And finally, in the background, there stood a wide variety of different groups awaiting some favourable decision on the introduction of pay-TV — American pay-TV distributors like HBO and Showtime eyeing possible Canadian arrangements, new Canadian companies like Lively Arts Market Builders (LAMB) hoping to provide specialized service devoted to culture, Northstar Home Theatre pushing satellite-to-home service, Can West Communications promoting some advertiser-supported service, and Bell Canada controlling the hardware for any pay-per-programme operation.[101]

In July 1980, the Therrien Committee — composed of provincial government representatives as well as federal regulators — reported back to the CRTC, to an expectant group of pay-TV supporters, and to a slightly bored Canadian public. Its major recommendation, based upon "the consensus opinion of a majority of members," was that approval should be given to the introduction of pay-TV in Canada but that, as a matter of priority, the CRTC "should give absolute precedence to public hearings and licensing actions on the extension of services, separate hearings on pay-television being deferred until later."[102] With regard to the organization and administration of pay-TV in Canada, the committee made several recommendations that diverged dramatically from both the 1978 CRTC report and the "objectives and guidelines" developed by the federal and provincial governments. It argued that pay-TV "should not be entrusted to a single national agency"; it suggested that "the federal government should initiate discussions with the governments of the provinces with a view to the authorization of program distributors to market pay-television services in Canada"; it proposed initially "setting the requisite Canadian content for pay-television at a realistic level responding to the capacity of the Canadian program production industry"; it urged "competition for licences to effect local delivery of pay-TV services, for which broadcasters, cable operators, and other entrepreneurs should be equally eligible" and furthermore that there should be no cross-subsidization and non-discriminatory access in the delivery of pay-TV service; it recommended that a pay-per-channel system should be employed in the first instance, but when a stable market for Canadian programmes had been established, it should be left to individual distributors and exhibitors to determine the most appropriate method of charging for the programming offered; it promoted the use of Canadian-made "hardware" to support the introduction of pay-TV; finally, and most surprisingly, in effect it rejected arguments for diversion of a certain percentage of gross revenues but did agree that "consideration should be given to imposing a flat surcharge on the rates paid for pay-TV services" to support the Canadian programme production industry.[103] In conclusion, the Therrien Committee described recent technological developments in the broadcasting field, of which pay-TV is but one, as "open[ing] a window on the future. And the view we have seen through that window is not to be feared, for it shows a better prospect than ever before, of broadcasting services that will attract Canadian viewers and benefit all the people of Canada."[104]

The recommendations of the Therrien Committee still required confirmation by the full CRTC and approval by the Minister of Communications before any second stage involving actual licensing hearings could begin. In response to the committee report, the chairman of the CRTC, John Meisel, indicated that he would be watching "like a hawk" to see how it was received and whether or not there was real public demand for pay-TV service.[105] The cable industry reacted with "amazement . . . that any regulator can feel pay-TV is not an imminent priority" and concern about some of the new considerations such as jurisdiction and competition that were now being introduced into the pay-TV issue. For their part, the broadcasters were also disappointed with the emphasis on competition in the provision of pay-TV service and the specification of regional service in addition to national service. As well, the programme production industry was unhappy about the waning interest in mandating a percentage of gross revenues for Canadian programming. Only the provincial governments seemed to be happy with the report because of its recognition of the need to clarify and resolve jurisdictional matters, and the federal government responded by trying to put the best face on the report.[106] Even in advance of its release, the federal minister, Francis Fox, had indicated that the federal government could proceed with licensing of pay-TV service whether or not the Therrien Committee or the CRTC recommended in favour of its introduction.[107] Late in October 1980, following "a series of meetings with the CRTC," the minister announced that the CRTC and the federal government had endorsed the recommendations of the Therrien Committee with regard to pay-TV.[108] The definitive decision on the introduction of pay-TV in Canada seemed to have been made — maybe!

Act IV — Dénouement or Further Delay?

Once the policy decision had finally been taken to proceed with the introduction of pay-TV in Canada, there still remained the not inconsequential matter of granting licences to applicants seeking to provide pay-TV service of one sort or another. Even before a licensing hearing could be called, however, it became clear that many of the same old difficulties facing pay-TV remained fundamentally unresolved. As the year 1981 began, the federal Department of Communications became preoccupied with the challenge to its authority and to its policy presented by the proliferation of unlicensed earth stations being sold and used to pirate American broadcast signals as well as any potential Canadian pay-TV service. Despite efforts to close down those operations that were most crassly commercial and to prosecute their owners, the federal government found itself defeated in the courts when it attempted to claim federal authority to take such action and eventually was forced to liberalize their policy concerning earth stations.[109] Meanwhile, the CRTC moved, in accordance with the recommendations of the Therrien report, to first hold licensing hearings on extension of broadcasting services to northern and remote communities. These hearings took place early in 1981, and satellite distribution of additional broadcasting services was licensed later that year.[110] On another front, the provincial governments continued to challenge federal jurisdiction over pay-TV in spite of their previous agreement with the federal government on "objectives and guidelines" and the favourable thrust of the Therrien report. Following the federal government's decision to go ahead, the provincial ministers of communications met on their own and agreed unanimously to reassert their claim to full jurisdiction over pay-TV and all cable distribution services within their boundaries.[111] Finally, it became increasingly clear that there was as yet no substantial public demand for pay-TV in Canada. In March 1981, the CRTC released the results of a recent survey commissioned on pay-TV that revealed that only 14 per cent of present cable subscribers — the same figure as in 1978 — would be "very likely" to subscribe to pay-TV service if it were introduced in Canada.[112]

In April 1981, the CRTC eventually got around — fully six months after its decision to proceed — to issuing its "Call for Applications for Pay Television Service" to be considered in the fall of that year. This call for applications is itself a most interesting document because of the way in which it attempts to structure and prod the licensing process. In addition to the normal objectives previously identified for pay-TV, the CRTC emphasized its specific concern that any service licensed would also "increase the diversity of programming available to Canadians" and "make available high quality Canadian programming from new programming sources by providing new opportunities . . . for Canadian producers currently unable to gain access to the broadcasting system."[113] Reinforcing this emphasis on new initiatives, it suggested that any licensed service "could be either of broad, mass appeal or more specialized and directed to a particular age or interest group"; that applicants should be "as imaginative and innovative as possible, not only with regard to the structure for the delivery of pay television service, but also with regard to the programming content of the service"; and that the licensing process should be regarded as "evolutionary and, to some extent, experimental."[114] As to specific directives to prospective applicants, the CRTC made six major points:

first, applicants should make clear "specific steps they would be prepared to take to ensure the desired flow of funds and their distribution within the Canadian program production industry," taking into account that no explicit cross-subsidization and no advertising revenues will be considered; secondly, pay-per-channel service is the most likely format to be licensed initially but the Commission "will be hesitant to accept proposals which preclude the eventual adaptation of any proposed system to pay-per-program capability"; thirdly, no preference was revealed as to how national and regional pay-TV services should be configured; fourthly, concern was expressed about the potential deleterious effects on independently produced programming if ownership of the "production" and "distribution" functions were to be combined and on access for other pay-TV services if ownership of the "distribution" and "exhibition" functions overlap; fifthly, no minimum Canadian content requirements were specified except to note that "percentage of exhibition time," "percentage of programs acquired," and "percentage of gross revenues spent on the acquisition of Canadian programs" would all be taken into account; sixthly, neither siphoning of programming from commercial television onto pay-TV service nor insertion of pay-TV service onto currently available broadcasting service will be permitted.[115] To its credit, the ground rules laid down by the CRTC in its call for applications demonstrate as much of a concern for the product to be provided on the screens as for the structure and operation of the pay-TV system.

In advance of the licensing hearings, there was considerable jockeying for position among prospective distributors as well as the emergence of a surprising number of applicants previously unheard from. PTN, now firmly under the control of Ted Rogers and his burgeoning multinational cable group, followed up its long-standing commitment to offer shares to broadcasters and programme producers but was rebuffed by the major networks while having somewhat more success in co-opting some of the latter.[116] For its part, the CBC continued to explore the possibility of a joint proposal with CTV and TVA for a broadcaster-controlled pay-TV distributorship but eventually withdrew from these discussions and left the two private broadcasters to develop their own proposal.[117] Bell Canada also continued to offer their pay-per-programme technology to the cable companies but was firmly turned down.[118] New proposals for national pay-TV service were prepared by broadcaster-controlled groups like Baton Broadcasting and Western Broadcasting as well as by independent programme producers like Astral Bellevue Pathé of Montreal, and there were also proposals for more specialized cultural and sports services to be offered in addition to mass appeal services.[119] Perhaps the greatest variety of proposals were for regional pay-TV services, something that until recently had not really been anticipated, and among the more important of these were an Atlantic film/video group based in Halifax and a cable group from Edmonton.[120] And finally, one late-comer to the scramble for a pay-TV licence was a proposal put forward by Telecanada that, unlike other proposals, sought approval for a universal pay-TV service to be added on top of existing cable service and made compulsory for all cable subscribers.[121]

In September 1981, the CRTC finally began the first of a two-part set of hearings to license a pay-TV system in Canada. The first hearings were to receive and assess applications for the origination of pay-TV and the second set would be concerned with evaluating applications for the exhibition of pay-TV. The first hearings attracted 54 applications from which the CRTC selected 28 to be heard. The other 26 applications were rejected because either they failed to meet the criteria for a pay-TV network outlined by the Commission in its elaborate call for applications or they were insufficiently documented to be considered viable proposals. Among the acceptable applications there were several new developments. First, 16 of the 28 applications to be heard were proposals to establish a regional pay-TV service. For instance, Star Channel Services and its major owner Finlay MacDonald proposed to establish an independent system in the Atlantic provinces, while Allarco Broadcasting Limited, in its Alberta Independent Pay Television submission, would do the same in Alberta. Secondly, while many of the earlier players were back, there were also a good number of new actors. Among those participants of earlier hearings who were now seeking a licence were PTN, newly christened as the Canadian Première Television Network (CPTN) and restructured so as to downplay the role of the cable industry, the CTV and TVA networks, conveniently grouped together as CTVA Communications, and a proposal from Astral Bellevue Pathé Films of Montreal. The new players included First Choice Canadian, a consortium with the financial backing of several large institutional investors, two proposals from recently formed companies named Performance and Showcase, and a proposal from Telecanada, a non-profit and non-shareholder corporation headed up by the former Minister of Communications, David MacDonald, and including on its board a number of prominent cultural and political personalities.

The applications as a group were characterized by three common themes. First, it was widely argued that pay-TV would not be a profitable venture for at least the first five years, a position that some observers regarded as a tactic to persuade the CRTC to be more permissive in its regulation of content. Secondly, the applications all stressed the generous financial support they would make available to promote the projects of Canadian independent producers in their efforts to create popular and saleable Canadian productions. Thirdly, while there was some variety in the proposals, including one for a sports channel and another concentrating on cultural events, the backbone of most of the applications was a dependence on recent foreign and especially American films as a means of generating an acceptable revenue flow. Moreover, the applications also posed a number of problems for the CRTC. In the first place, in so far as the Commission might want to license both national and regional operators, its position was hampered by the absence of a regional application from Quebec. Secondly, the CRTC's goals with respect to increased Canadian content were threatened by the willingness of the applicants to sacrifice Canadian content in the short term in order to finance increased Canadian programming over the longer term. Finally, the applications paid little attention to some of the consumer concerns that are emerging in the United States where, for example, siphoning is becoming a more prominent consequence of the growth of pay-TV. The scramble for pay-TV was on in full force and it was up to the CRTC to make its decision.

A Profile of the Players

The Cable Companies

From the beginning, the moving force behind the introduction of pay-TV in Canada has been the cable industry with its proposal for the establishment of a Pay Television Network (PTN). PTN, unveiled in 1976, was largely the creation of Ted Rogers initially through his control over Rogers Cable TV and eventually, as a result of mergers with Canadian Cablesystems and Premier Cablevision, through his control of Rogers Telecommunications. PTN made its first submission to the 1977 hearings and then sought approval once more at the 1980 hearings when it claimed shareholder support for its proposal from 125 cable companies serving 80 per cent of all cable subscribers.[122] At the 1981 licensing hearings, the PTN proposal reappeared as part of a new application, that of the Canadian Première Television Network (CPTN) headed by Moses Znaimer with a background in private broadcasting, in which the role of the cable industry was downplayed in order to de-emphasize the corporate connections between the proposed pay-TV distributor and the cable companies that would most likely exhibit the signal locally. While the cable companies in their role as probable exhibitors would undoubtedly benefit from any pay-TV proposal accepted by the CRTC, the cable industry was primarily interested in the even greater potential gains to be derived from acting as the major distributor for pay-TV.

The corporate structure proposed initially for PTN and later for CPTN was that of a private-sector monopoly, but it went through various stages of elaboration in which the role of the cable companies was gradually played down to give the appearance of a company more representative of other interested parties. Initially in 1976, PTN was to be controlled exclusively by the cable companies. Its 1977 submission would have given the cable companies only a controlling interest while permitting the private broadcasters and independent producers to acquire some shares in the operation. By 1980, the PTN proposal suggested that ideally the broadcasters, independent producers, and cable companies should all be equal partners in the project. If necessary, however, the cable companies would separately underwrite the entire enterprise and operate it on their own. The 1981 CPTN proposal retained the offer to include the broadcasters and independent producers as shareholders but was also diversified to include a large number of private investors as shareholders. While these changes in the proposed corporate structure of the PTN suggested a growing willingness of the cable companies to accommodate broadcaster interests in particular, it was also clear that even under the terms of equal partnership the cable companies intended to control the operation.

With respect to exhibition of the pay-TV signal, the PTN proposal and the subsequent CPTN proposal both called for distribution of the signal by satellite and provision of the pay-TV package in both English and French to local exhibitors, most of whom would probably be cable companies. The local exhibitors would set their own rates and provide the service on a pay-per-channel basis. PTN itself would co-ordinate and develop the pay-TV package but would not be involved directly in programme production. Instead, programming would be purchased from independent production companies. Both the PTN and CPTN proposals showed no apparent concern for any ill-effects for the Canadian public that might result from concurrent cable company involvement in both the distribution and exhibition functions. Furthermore, while the pay-per-channel emphasis had the appearance of being merely a technological choice, it was also designed to thwart the efforts of the telephone companies and, in particular, Bell Canada to promote its 'black box' and its pay-per-programme capability. The potential market in other premium services beckons and the cable industry is determined to establish itself as a viable medium for delivering pay-TV and other services.

The general thrust of the PTN proposal, along with the representations made by many small cable companies, was that government regulation of the emerging pay-TV industry should be severely limited. Beyond the initial licensing decision, the industry should be allowed to market its product with as little interference as possible. This position has been central to all of the PTN submissions as well as the CPTN brief. The major justification for the proposed low level of regulation has been concern about the economic viability of pay-TV, and this concern appeared to grow in the more recent CPTN submission. The cable operators anticipate small profits for pay-TV in the initial years under the most positive of scenarios, and argue that government efforts to enforce Canadian content guide-lines in these early years would undermine the economic viability of pay-TV by limiting its market appeal. Demand for the service would be maximized if it provided a heavy diet of recent movies, most of which would be American. Any effort to seriously restrict foreign programming could only reduce the attractiveness of pay-TV to television viewers. The PTN proposal did not regard siphoning of programming from 'free' television as a problem or danger in either the immediate or near future.

PTN and its successor, CPTN, were not the only representations made by the cable industry before the CRTC. In 1980 a number of smaller cable companies also made submissions. As a group they put particular weight on the need to keep down the cost of any pay-TV package and the need to minimize constraints on the freedom of the pay-TV distributor to provide popular foreign programming. However, there were also hints, most eloquently reflected in the submission of Classic Communications, that at least some of the cable companies were concerned about the licensing of any private-sector monopoly for fear that it would have too much market power.[123] Similarly, there was concern that the use of satellites to distribute the pay-TV package would excessively increase the cost of pay-TV. Despite these minor variations, the cable companies, led by Ted Rogers, have been substantially united behind the substance of the PTN proposal and its successor CPTN with its concern to maximize the appeal of pay-TV to a wary customer.

The Broadcasters

Until recently the major concern of the broadcasters, both public and private, was to prevent the introduction of pay-TV. This was reflected in the broadcasters' proposals at the 1977 pay-TV hearings, which were strongly opposed to the introduction of pay-TV. In 1980, however, the broadcasters emerged as competitors to the cable operators, having accepted the inevitability that pay-TV would soon be licensed. While the 1980 submissions from the broadcasters varied in the degree to which they supported the establishment of a pay-TV system, they all agreed that if pay-TV were to be introduced, it should be done by means of a private-sector monopoly controlled by the three broadcast networks, which would provide the greatest protection for the existing broadcasting system and their own interests. The major concerns of the broadcasters have related to two dangers attributed to pay-TV — audience fragmentation and programme siphoning. Both posed serious threats to the already precarious financial viability of Canada's networks and their harmful effects could only be avoided if the broadcasters controlled any pay-TV license themselves. The broadcasters' proposals called for the cable companies to confine themselves to the role of exhibitor of the broadcaster-initiated pay-TV signal. As well, any broadcaster-controlled pay-TV system, with both an English and French language service, could provide both increased revenue for the independent production industry and, indirectly, for the broadcasters themselves.

The most eloquent and forceful statement of the general position of the broadcasters has been made by the CBC even though the CBC has continually opposed pay-TV.[124] In its 1976 submission, the CBC rejected pay-TV, reasoning that inevitably there would be further audience fragmentation, additional reductions in the average time spent viewing Canadian programming, and siphoning. By 1980, however, the CBC, while not enthusiastic about the prospect of pay-TV, had accepted the likelihood of its introduction and wanted to ensure that the broadcasters exercised control over pay-TV programming. The CBC suggested in its brief that broadcaster control over the central pay-TV agency could transform the potential threat to Canadian cultural sovereignty posed by pay-TV into an opportunity for Canadian production companies. With this in mind, the CBC proposed a single national pay-TV network in each language, run by non-profit corporations and either public or private in character, and with a Board of Directors controlled by the broadcasters, although they could include minority representation for the independent production sector as well as the cable companies. The three broadcasters — the CBC, CTV, and TVA networks — would seek to maximize pay-TV revenues and target 5 per cent of gross revenues for programme development under the administration of a separate board as well as use a share of net revenues to procure Canadian productions. In advocating that it would provide both a standard pay-TV service with its stress on popular foreign programming to maximize the subscriber base while at the same time arguing that only the broadcasters could safeguard Canadian content, the CBC put itself in the contradictory position of accepting the logic of the private-sector actors while attempting to achieve simultaneously two contradictory goals. In the 1981 licensing hearings, having had its TV-2 proposal rejected by the CRTC, the CBC withdrew from the consortium.

The two remaining partners, CTV and TVA, recombined however and put forward a proposal largely consistent with the earlier 1980 position. The CTVA Communications corporation would be owned two thirds by CTV and one third by TVA, with each broadcaster represented on the CTVA board in proportion to its ownership. Service would be provided in both English and French and would be delivered by satellite and locally by cable. The programming would be predominantly movies although CTVA also was promising to provide 25 per cent Canadian content initially, rising eventually to 37 per cent of viewing hours. CTVA would not be directly involved in programme production, but instead it would purchase programmes from production companies, presumably including those in which the two networks had an interest.

The general agreement among the broadcasters was only broken by the discordant stance of the Global Television Network.[125] In 1976, in its "Target Television" proposal, Global had argued that pay-TV should adopt a strategy of programming for minority tastes rather than pursuing the American mass-appeal emphasis. The 1980 submission proposed that the local pay-TV exhibitor should have to purchase all of its programming from a licensed Canadian broadcaster but that no broadcaster need provide an entire channel of programming. Instead material, whether foreign or domestic, would be acquired in "packages" from a Canadian broadcaster and the local cable company would thus put together its own pay-TV package. Canadian content requirements would be imposed immediately and the service could be introduced quickly. In this way Global's proposal would eliminate the problem of who should control any pay-TV corporation because no new entity would be created to provide the service. Similarly the broadcasters would have control over what could be siphoned and would get some benefit through programme production from any resulting audience fragmentation. The Global submission once again underlined the broadcasters' concern that only through their control over pay-TV could their existing position be protected. Other private broadcasters such as Standard Broadcasting and Allarco Broadcasting also showed an off-and-on interest in pay-TV and, in 1981, made applications for national and regional licences.

Pay-TV Packagers

Among the major national licence applications at the 1981 hearings, along with those of Canadian Première and CTVA, were four made by Showplace Communications, Performance, Astral-Tel Communications, and First Choice Communications. All of these applications came from recent entrants in the pay-TV scramble and, because of their hybrid character, fit uneasily into any simple categorization of interests. Appearing only at the end of a long process of review and hearings by the CRTC, these applications brought together prominent figures in the broadcasting industry with the necessary financial backers, and involved the creation of new corporate entities specifically devoted to the packaging and distribution of pay-TV.

The first, Showplace, is owned and controlled primarily by Standard Broadcasting and ultimately by the Argus Corporation. Its proposed pay-TV service would be provided only in English, although an audio channel in French would be added wherever a French sound-track was available. Programming would involve a heavy diet of films and special presentations, and Showplace proposed to include about 30 per cent Canadian content in its early years rising eventually to 50 per cent. It promised to minimize siphoning by not showing any programmes that were presently scheduled on commercial television. Finally, with respect to programme production, Showplace promised to take a fairly active role both by doing some production of its own and by taking an equity position in other independent productions. Both the strengths and the weaknesses of the Showplace proposal lie in its close connection with established private broadcasters.

A second application came from Performance, The Canadian Entertainment Network. Unlike some of the other proposals, Performance has no direct ties to other sectors of the broadcasting industry and would be 27 per cent owned by the Samson Indian Band, 10 per cent owned by the Nordicity Group, which is a consulting firm in Ottawa, along with other small Canadian investors. The Performance proposal provided only for English-language service and would be composed largely of feature films with Canadian content commencing at 34 per cent and rising to 51 per cent within five years. It also included an interesting proposal for "access programming" wherein producers would be allowed very limited access to the pay-TV network in order to independently exhibit their productions. With no serious conflict of interest, the major weaknesses in the Performance proposal may well lie in its lack of French-language service.

A third applicant is Astral-Tel Communications with majority ownership in the hands of Astral Bellevue Pathé and minority ownership by Telemedia as well as other small investors. As a producer and distributor of television and film productions, its parent company could clearly be a substantial beneficiary if Astral-Tel were to be licensed. Astral-Tel proposed two pay-TV channels, one largely devoted to films and special presentations and a second one involving more specialized programming, both of which would be available in English and French. It also promised to establish a "Canadian Production Fund" under the control of Astral-Tel itself, which would be used to support Canadian programme producers. While comprehensive in conception and impressive in terms of the range of service to be provided, one important concern about the Astral-Tel proposal is its obvious link to a major programme producer.

The fourth major applicant is First Choice Canadian, a company owned and controlled by ten investors, each in approximately equal measure, and including among them such large firms as Manulife and Royfund. The service proposed by First Choice Canadian would involve two channels, one exclusively in English and the other equally divided between English and French programming. The two channels would show mostly feature films with a minimum Canadian content of 50 per cent at inception. The most distinctive feature of the First Choice application is its promised financial commitment to Canadian programming, which is considerably higher over the initial five-year period than most other proposals. First Choice offered to give programme producers the proceeds of a "Canadian Creative Development Levy" that would be assessed as a fixed percentage of each customer's fee. Clearly, First Choice Canadian sought to woo the CRTC both with its range of service and its apparently considerable commitment to Canadian programming.

Canadian Production Industry

The various production groups making submissions to the CRTC in 1980 and at the licensing hearings in 1981 were favourably disposed toward the introduction of pay-TV provided that certain conditions were met. First and foremost, the groups saw pay-TV as an important opportunity to generate new revenues for the Canadian production industry. Concomitantly, there was strong support for a demanding requirement with respect to Canadian content. These two concerns were obviously complementary, and the various production industry groups were generally inclined to require any pay-TV operator to direct a substantial proportion of its revenues toward the funding of Canadian productions. A third and equally important common concern of the production industry was with the issue of control over any new pay-TV operator. There was a general consensus that control by the cable companies or by the private broadcasters would be detrimental to the Canadian production industry because they lacked primary commitment to developing Canadian production material.

In one respect, however, there were important internal differences among the proposals made by those involved in the production industry. One line of thought developed by the Council of Canadian Filmmakers in its 1977 brief, the Joint Action Committee on Pay-TV and Satellite Policy (JAC) in its 1980 brief, and the 1981 licence application by Telecanada, has been a much greater willingness to sacrifice any advantages of competition toward the establishment of some form of public monopoly that would be largely oriented toward the promotion of Canadian content and its production.[126] Proponents of this cultural nationalist position have also suggested using more obviously coercive policy instruments such as universal billing in order to achieve their goals. Quite a different position, espoused by such groups as the Independent Producers Committee for Pay-Television (IPC), was much more concerned that any pay-TV system should offer well-defined competitive opportunities so that independent producers could be assured of a healthy market for their product.[127] The emphasis here was much less on the cultural dangers and opportunities associated with pay-TV and much more on the economic benefits that might be forthcoming in a competitive market, as long as a substantial amount of Canadian content were required.

Among the cultural nationalist proposals, the Council of Canadian Filmmakers set the stage in 1977 with its two-pronged suggestion for a universal model for pay-TV billing in order to quickly generate funds for Canadian productions, and for a public monopoly to act as the originator of the pay-TV signal. Pursuing the same general line of concern at the 1980 hearings, the JAC argued that the revenue-generating capacity of pay-TV was being grossly exaggerated. If pay-TV were to be introduced, the JAC wished to minimize the presence of foreign programming and direct as much as possible of the revenue generated by pay-TV for use on programme production and as little as possible for the acquisition of hardware to deliver and bill for the service. Given the absence of hardware requirements under a universal model, the JAC was indirectly pursuing the same position as that developed by the Council of Canadian Filmmakers in 1977. The JAC also proposed that there should be a 50 per cent Canadian content requirement and that 35 per cent of pay-TV gross revenues should go to Canadian productions. At the 1981 licensing hearings, a similar position was developed by the proponents of Telecanada, with the universal billing system estimated to generate an especially large and stable revenue flow to finance Canadian productions.

The Association of Canadian Television and Radio Artists (ACTRA) also took a strong nationalist position in its submission to the 1980 CRTC hearings, but it went much further than any of the other groups in its specific demands.[128] ACTRA was concerned that Canadian content on pay-TV should be 100 per cent, with respect to script, ownership, and production, and that government incentives should be available only to productions that qualify as Canadian content. On the nature of the pay-TV system to be implemented, ACTRA was concerned that any system should not be controlled by the cable companies, the broadcasters, the independent producers, or any combination of them. Instead, ACTRA preferred that a publicly controlled monopoly should be established. In many respects, then, the ACTRA submission supported the position of the cultural nationalists with their emphasis on pay-TV as a tool to raise money for the Canadian production industry.

The second group of producer representations that placed greater stress on the need for competition in the delivery of pay-TV can be best understood through the 1980 submission of the IPC. The IPC was a collective effort of the Canadian Film and Television Association and the Canadian Association of Motion Picture Producers, both of which had appeared at earlier hearings to press the case for pay-TV as an outlet for Canadian productions. The IPC put particular weight on three factors — the need to foster competition in the provision of pay-TV, the importance of establishing a clear separation in terms of ownership among all the components in the pay-TV system, and the need to establish stringent Canadian content requirements for pay-TV. Turning first to the issue of competition, the IPC argued that more than one pay-TV service should be made available to customers in order to create competition among programmers. One suggestion made by the IPC was that there should be both a federally and a provincially licensed programmer available to viewers in each province. Secondly, cross-ownership was also seen as a danger by the IPC. As a result the IPC proposed that there should be a clear separation of ownership between the production industry, programmers, and delivery system operators. Finally, with respect to the need for Canadian content requirements, the IPC favoured multiple requirements using a pay-per-package rather than pay-per-channel format. The IPC proposed that at least one half of programme expenditures should go toward Canadian productions, that at least one half of any package should be original Canadian material, and that Canadian content should constitute at least one half the total pay-TV viewing time.

At the 1981 licensing hearings, the positions of the various production-oriented groups were less obviously articulated. In part, this was because some of the 1980 representations such as that of Astral Bellevue Pathé appeared as part of consortium proposals, for example, the national licence application of Astral-Tel Communications. Furthermore, the concerns of the more general interest groups such as ACTRA were only presented indirectly through their support for or opposition to specific licence applications. As well, there was evidence of a clear tendency to blend the positions of the cultural nationalists with those more exclusively concerned with the economic viability of the production sector. On the one hand, the general consensus was that pay-TV should be introduced through a monopoly, but as a private-sector rather than public-sector monopoly. Most of the proposals also suggested that the originator should not be involved in the production industry except as a contractor and purchaser. On the other hand, the proposals all suggested that substantial sums should be directed toward the purchase of Canadian productions. While the estimated revenue flows varied substantially and would be dependent on market penetration and other such considerations, the Canadian production industry was clearly aiming to benefit substantially from the introduction of pay-TV.

Indirectly Affected Interests

This category encompasses a wide range of submissions from organizations and corporations that share very little in common except a concern about the potential impact of pay-TV on their industry. The telephone companies view the cable industry as potential competitors in the provision of premium services and, from a hardware point of view, pay-TV is merely one of many such services. Movie theatre owners regard pay-TV as not only a competitive entertainment vehicle but one that could, over time, put them out of business. Advertisers regard pay-TV as a threat to their future access to potential audiences who may well be willing to pay to avoid having to listen to advertising messages. All three groups saw their interests as threatened by pay-TV and, while not themselves direct participants in the debate, they have sought to get the CRTC to impose restrictions that would serve as protectionist measures.

Among these players, the telephone companies were obviously the most important not only because of their size but also because, within the context of communications policy making in Canada, three of the western provincial governments had provincially owned telephone companies whose interests are closely allied with those of the provincial government. The main common carriers — Bell Canada, the TransCanada Telephone System (TCTS), and Canadian National/Canadian Pacific Telecommunications (CNCP) — all made submissions about the introduction of pay-TV at both the 1977 and 1980 CRTC hearings but were only observers at the 1981 licensing hearings. In both instances, the underlying point of the common carriers was that they constituted a viable alternative to the cable companies for purposes of the delivery of the pay-TV signal. Of course, the common carriers were not interested in the programming aspects of pay-TV and were not proposing that they would operate such a service. Their interest was limited to the transmission of pay-TV signals. A second theme in the common carrier submissions was a desire to interest the CRTC in the adoption of satellite and pay-per-programme equipment in the transmission and delivery of pay-TV. Overall, the common carriers took a back seat throughout the hearing process, seemingly interested only in what most would regard as the peripheral issues in the pay-TV debate, but ever watchful for any implications a decision with respect to pay-TV might have for the future delivery of other premium services.

Bell Canada has been the major force among the common carriers.[129] In its 1976 submission, Bell was quite explicit about its concern that the cable companies were seeking to offer a broadband premium service that could just as easily and less expensively be provided by Bell itself. Indeed, Bell indicated it was both capable and ready to distribute pay-TV both nationally and locally. At the hearings in 1977 and again in 1980, Bell's attention was more narrowly focused on the potential of certain technologies. In 1980, Bell extolled the utility of its "black box", the Bell/BNR system for data collection and billing of pay-TV, which would allow it to provide not only a pay-per-programme but even a pay-per-view service. The 1980 submission represented Bell's role as one that would be highly supportive of any designated pay-TV operators.

Not surprisingly, the Bell Canada proposal was supported by that of TCTS.[130] In its 1976 brief, TCTS had concentrated its attention on the ability of both Bell and the other TCTS members to handle the distribution of pay-TV. TCTS was particularly critical of the limitations inherent in the original videotape distribution system proposed by the PTN in 1976. The 1976 TCTS submission also indicated that it expected that when pay-TV became available, it would be delivered by a consortium composed of the cable companies, the broadcasters, and the independent producers with some government representation. The 1980 submission of TCTS concentrated on the use and capability of satellite technology and the desirability of using satellites to distribute pay-TV. Yet another position was advanced by CNCP.[131] The 1976 CNCP brief had concentrated on the corporation's ability to deliver any proposed pay-TV signal. CNCP was ready to match its capability with that of Bell Canada/TCTS as well as of the cable companies. In 1980, the CNCP submission concentrated on the desirability of using satellites to deliver pay-TV and the advantages in terms of costs that would derive from competition between CNCP and TCTS. CNCP expected that the result would be a lowering of satellite rates and consequently a lower-cost service for the consumer. However, as with the telephone companies and the TCTS, CNCP did not make a submission at the 1981 licensing hearings.

Submissions were also made to the 1980 CRTC hearings by the movie theatre associations and the advertisers. The Motion Picture Theatre Association of Canada expressed its long-standing view that films should be held back from pay-TV for one year as protection for the movie theatre industry and that Canadian content should be scheduled at prime time viewing hours so that, once again, the competition posed by pay-TV would be lessened.[132] The Theatre Association also opposed any national pay-TV monopoly and, indeed, argued that theatre owners in small communities should be able to participate in any pay-TV operations. Another group, the Joint Broadcast Committee of the Association of Canadian Advertisers, was alarmed at the potential loss of advertising revenues and made a strong claim as to the positive social role played by advertising. It argued that with advertising on pay-TV, even more funds would be generated for Canadian programme production. Clearly, the pay-TV decision has wide-ranging implications for a variety of existing industries.

Public Interest Representations

While we have examined the role and positions of a wide range of groups that had something to gain from a favourable pay-TV licensing decision, there were also a large number of actors whose interest was less obviously one of personal or corporate gain and had more to do with their concern about the potential impact of pay-TV on Canadian society. A large number of groups and organizations made 'public interest' representations and interventions through the course of the 1980 and 1981 CRTC hearings. We will examine four of these submissions as illustrative of the character of concerns being expressed in these representations: two that were made to the 1980 hearings by the Canada Council and by the Canadian Broadcasting League, and two interventions made at the 1981 licensing hearings by the Bureau of Competition Policy and by the Consumers' Association of Canada. The overall thrust of the earlier 1980 representations was to underline the concern of their sponsors for the cultural integrity of Canada in the face of pressures to introduce even more American programming through pay-TV. These submissions focused primarily on the need to protect collective interests against the pressures of Americanization. The later 1981 interventions dealt with specific licensing applications and, as a result, they focused more on the desirable economic structure of the pay-TV system that would be licensed by the CRTC.

For its part, the Canada Council was particularly concerned that pay-TV should be structured so that it met our cultural needs and that it should take account of the broader concerns and priorities that Canadians feel are necessary to sustain a sense of nationhood.[133] The Canada Council argued that the unfortunately low level of Canadian content on free television already reflected the imperatives of broadcasting economics, and therefore it was concerned that pay-TV would equally reflect excessive American influence for similar reasons. Although the Canada Council agreed that pay-TV could provide the stable and renewable revenue base that the Canadian production industry needed in order to prosper, pay-TV should not be introduced faster than the ability of the operator to programme the service in a way compatible with our cultural goals. The Canada Council's perspective at the 1980 hearings differed substantially from that of the cable companies and broadcasters, including the CBC, in that, unlike the Council, the others were more willing to more completely sacrifice Canadian content requirements on pay-TV, at least in the initial years, in order to reap the financial benefits of pay-TV.

The Canadian Broadcasting League (CBL) was likewise concerned about the potential threat posed by pay-TV.[134] The CBL saw the growing pressures for the introduction of pay-TV in the context of a long chain of technological pressures beginning in the late 1920s and continuing to the present. The CBL saw communications technology as a continuing source of change and thus of new problems for those who would seek to protect the Canadian sense of nationhood from excessive American cultural influence. In the case of pay-TV, the CBL brief argued that excess satellite capacity on Telesat along with the rapid development of pay-cable in the United States were the predominant forces pushing the CRTC to license pay-TV operators. In this way, technological change combined with economic self-interest to challenge Canada's cultural integrity. With its distrust of the private broadcasters for their failure to live up to the spirit of the 1968 Broadcasting Act, the CBL saw the CBC's role in any pay-TV operation as crucial and indeed believed that the CBC should operate and control any pay-TV service.

At the 1981 licensing hearings, the Bureau of Competition Policy intervened to emphasize two specific fears with which it felt the CRTC must come to grips.[135] The first fear concerned the degree of competition desirable and the apparent preference of most of the national applications for a monopoly structure. The bureau regarded applicant fears about the impact of competition with respect to market fragmentation and with respect to a possible bidding war over the acquisition of film rights as purely speculative and argued that any such losses would be more than offset by gains for the Canadian production industry that would derive from competition for their product. The second fear concerned the possible vertical integration of pay-TV operators with the programme production industry as well as other sectors such as the cable industry. The bureau had little confidence in the protective value of "arm's length" relationships because they were so difficult to enforce, and it was especially concerned that the responsibilities of the cable industry as an exhibitor of pay-TV should be well defined.

The Consumers' Association of Canada (CAC) was likewise concerned with the issue of market structure and also supported measures to ensure reasonable competition for the benefit of consumers and programme producers.[136] The CAC expressed strong concern about the dangers of siphoning, that high equipment costs should be avoided, that exhibition fees should be controlled to prevent the exercise of monopoly power by the cable industry, and that the services licensed should be unique. The CAC also reported the results of a survey it conducted of its membership in which a majority of respondents were not very enthusiastic about pay-TV. The CAC concluded from this evidence that demand for pay-TV in Canada was still weak and that many of the projections of revenue flows in the licence applications were unrealistically high. Through the long and drawn-out series of public hearings between 1975 and 1981, there has been more than ample opportunity for the major players in the pay-TV drama to make their positions known.

Concluding Comments

The pay-TV drama is now proceeding towards an apparent conclusion. This essay has sought to provide a guide to the evolving plot and the major players. The many themes and subtle variations that weave their way through this little drama have been identified and briefly explored. In particular, we have seen how the pay-TV issue raises fundamental questions about whether cultural survival and economic advantage can be suitably reconciled as well as nagging doubts about the adequacy of the regulatory process wherein these questions must be resolved. Through four acts and fully a decade of deliberation and delay, we have traced out the development of the still-unfurnished plot. Each major thrust and counter-thrust has been described as pay-TV promoters and their opponents come into conflict, federal and provincial governments jockey for control and advantage, successive ministers and various government departments and agencies attempt to formulate their position, and the responsible regulatory authority struggles fitfully to arrive at a proper decision. Finally, all of the major players in this little piece have been profiled and their differing views and interests with regard to the introduction of pay-TV in Canada have been at least summarily treated. All that remains is for the CRTC to render its long-awaited decision as to how pay-TV will be introduced in Canada and on what terms and conditions, and for subsequent critics, both the experts and the Canadian public, to have their due.

Notes

[1] On technology as a key to the communications field, see R. Brian Woodrow, Kenneth B. Woodside, Henry Wiseman and John B. Black, *Conflict Over Communications Policy* (Montreal: C.D. Howe Institute, 1980), Chapter 1.

[2] A general analysis of the threat of cultural domination can be found in Bernard Ostry, *The Cultural Connection: An Essay on Culture and Government Policy in Canada* (Toronto: McClelland and Stewart, 1980).

[3] For a treatment of communications from an industrial strategy perspective, see Shirley Serafini and Michel Andrieu, *The Information Revolution and Its Implications for Canada* (Ottawa: Minister of Supply and Services Canada, 1980).

[4] On Canadian broadcasting as part of our "public enterprise" culture, see Herschel Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J.J. Douglas, 1974), Chapters 11, 12.

[5] The particular difficulties of regulatory policy making in a federal and parliamentary system have been explored in Richard Schultz, *Federalism and the Regulatory Process* (Montreal: The Institute for Research on Public Policy, 1979); and Richard Schultz, "The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act," Regulation Reference Working Paper No. 6 (Ottawa: Economic Council of Canada, 1980).

[6] For a treatment of regulatory decision making and the notion of the public interest, see Douglas G. Hartle, *Public Policy Decision Making and Regulation* (Montreal: The Institute for Research on Public Policy, 1979).

[7] Pronouncing its epitaph perhaps somewhat prematurely in 1965, the *Toronto Star's* legendary critic, Nathan Cohen, declared that "Pay-TV is the biggest most expensive act of collective self-deception in the experience of show business." On the early history of pay-TV in Canada and the Etobicoke experiment, see Roy Shields, "Trial One Laid a $3 Million Egg," *Canadian Business* 53 (June 1980), p. 76.

[8] On the early American experience, see Richard Adler and Walter S. Baer, *The Electronic Box Office: Humanities and Arts on the Cable* (New York: Praeger, 1974); and Don R. LeDuc, *Cable Television and the FCC: A Crisis in Media Control* (Philadelphia: Temple University Press, 1974).

[9] Broadcasting Act, R.S.C. 1970, c. B–11, s. 16.

[10] *Ibid.*, s. 3 (emphasis added).

[11] On the CRTC and its early regulatory activity *vis-à-vis* the cable industry, see Canadian Radio-Television Commission, "Policy Statement on Cable Television" (Ottawa, 1971); also, Robert E. Babe, *Cable Television and Telecommunications in Canada* (East Lansing: Michigan State University, Graduate School of Business Administration, 1975).

[12] See Department of Communications, *Instant World: A Report on Telecommunications in Canada* (Ottawa: Information Canada, 1971), especially pp. 13–14, 18.

[13] For evidence of CBC concern about changes in the broadcasting system, see Frank W. Peers, "Oh Say, Can You See?" in Ian Lumsden, ed., *Close the 49th Parallel etc.; The Americanization of Canada* (Toronto: University of Toronto Press, 1970), pp. 135–56.

[14] On the early growth and development of the cable television industry in Canada, see Senate Special Committee on the Mass Media, *Words, Music and Dollars* (Ottawa: Information Canada, 1970), pp. 357–417.

[15] See Gary Lax, "Cable Television and the Canadian Broadcasting System," in Abraham Rotstein and Gary Lax, eds., *Getting It Back: A Program for Canadian Independence* (Toronto: Clarke, Irwin, 1974), pp. 222–50.

[16] On the early history of pay-TV in Canada, see Canadian Radio-television and Telecommunications Commission, *Report on Pay-Television* (Ottawa: Minister of Supply and Services Canada, 1978), Chapter 2.

[17] See CRTC, *Annual Report, 1972–73*, p. 36.

[18] CRTC, Public Announcement, 3 October 1972.

[19] For details on the federal-provincial conflict, see Woodrow *et al.*, *Conflict Over Communications Policy*, Chapter 2.

[20] See Department of Communications, *Annual Report, 1974–75*, p. 8; and Secretary of State, *Annual Report, 1975–76*, p. 6.

[21] Hon. Gérard Pelletier, Speech to the Canadian Cable Television Association, Vancouver, 1 May 1975.

[22] For the CBC view, see CBC, *Annual Report, 1975–76*, p. 4.

[23] Canadian Telecommunications Carriers Association, "Management in a Regulatory Environment" (Ottawa, 1975), p. 4.

[24] Canadian Radio-Television Commission, "Feature Motion Pictures on Cable Television Systems," 5 December 1973.

[25] For a description of this service, see Philip Lind, "Hotel Pay-TV," *Cinema Canada* (August 1976), pp. 32–33.

[26] On the All-View Service, see Douglas Mepham, "Blue Box Stirs Turmoil in TV," *Financial Post* (15 May 1976), p. 5.

[27] See "Pay-TV via Satellite," *Broadcaster* 34 (July 1975), p. 20.

[28] Canadian Radio-Television Commission, "Position Paper on Pay-Television Service," 17 February 1975, p. 4.

[29] *Ibid*., p. 14.

[30] Canadian Cablesystems Ltd., Premier Cablevision Ltd., and Rogers Cable TV Ltd., "Pay Television: The Opportunities, Challenges and Approach," June 1975.

[31] For a review of the 1975 hearings, see S. Craig, "CRTC Cable Hearings: CCTA Put the Heat on for Pay-TV Go-ahead," *Marketing* (19 June 1975), pp. 3–4; and Michel Lavoie, "Pay-TV Backers Given Scant Hope," *Financial Post* (28 June 1975), p. C5.

[32] Canadian Radio-Television Commission, "Policies Respecting Broadcasting Undertakings (Cable Television)," 16 December 1975, pp. 10–11.

[33] See Hon. Jeanne Sauvé, "Pay Television Must Develop Canadian Production," Speech to the Canadian Cable Television Association, Toronto, 2 June 1976. Reprinted in *Special Supplement on Pay-TV*, *Cinema Canada* (August 1976), pp. 5–7.

[34] *Ibid*., p. 6.

[35] *Ibid*., p. 7.

[36] *Ibid*., passim

[37] Harry Boyle, "Premium TV for Canada — A Partnership in Canada," Speech to the Canadian Cable Television Association, Toronto, 2 June 1976. Reprinted in *Cinema Canada* (August 1976), pp. 8–9.

[38] *Ibid*., p. 9.

[39] *Ibid*., passim

[40] For a treatment of developments in the United States, see Thomas H. Guback, "Pay TV in the United States: Contradictions in Search of a Policy," *Cinema Canada* (August 1976), pp. 21–25; also Paula Smith, "The Cable Industry Comes of Age," *Duns Review* 107 (June 1976), pp. 55–57, 90–92.

[41] On their implications for Canada, see Hugh H. Edmunds, "The Big Picture," *Cinema Canada* (August 1976), pp. 12–16.

[42] For a review of provincial government interest in pay-TV, see Robert J. Buchan, "Federal and Provincial Policies on New Programming Services," in Peter S. Grant, ed., *New Directions in Canadian Communications Law and Policy* (Toronto: Law Society of Upper Canada, 1980), especially pp. 193–96.

[43] On the Saskatchewan and Quebec government positions, see Government of Saskatchewan, "*Cable Television in Saskatchewan*," a presentation by the Government of Saskatchewan to the CRTC, Regina, 9 February 1976, especially pp. 17–21; and Québec, Comité directeur pour l'étude de la télévision à péage, *La télévision à péage au Québec : éléments d'une politique* (Quebec, 1977).

[44] See "Rogers Warns of Pay-TV Possibility," *Marketing* (9 February 1976), p. 17; "Cable's Unique Contribution — Pay-TV, Hind-Smith Says," *Broadcaster* 35 (July 1976), p. 22; Colin D. Watson, "The Cable Viewpoint," *Cinema Canada* (August 1976), pp. 18–20.

[45] For a rather negative assessment of the cable industry position, see Jean McNulty, "Pay Television and the Cable Industry," in Canadian Broadcasting League, *The Crisis in Canadian Broadcasting* (Ottawa, 1976).

[46] Patrick Howe, "Cable Industry Forms Company to Begin Introducing Pay-TV," *Globe and Mail* (5 June 1976), p. B12; also "Pay-TV Ahead — Interview with Colin Watson, President of PTN," *Cable Communications* 42 (August 1976), p. 8.

[47] Douglas Mepham, "Broadcasters Wary About Forming Pay-TV Alliance," *Financial Post* (22 May 1976), p. 5; Barbara Byers, "CTV and Cable in Battle for Pay-TV," *Broadcaster* (August 1976), pp. 30, 48; "CBC Opposes Pay-TV Now in CRTC Brief," *Broadcaster* (October 1976), pp. 28, 30.

[48] For a range of views see Barbara Byers, "Pay-TV Could Save the Film Industry," *Broadcaster* (January 1977), pp. 7–11, and Secretary of State, *The Film Industry in Canada* (Ottawa, 1977), especially pp. 83–87.

[49] "Pay-TV May Be Piggy-Backed to Homes," *Globe and Mail* (30 July 1976), p. B4; "Commercials on Pay-TV," *Broadcaster* (November 1976), p. 3.

[50] On opposition to pay-TV from several public interest groups, see "Dim Picture on Pay-TV," *Financial Post* (2 October 1976), p. 8; and "Postpone Pay-TV 220 Say," *Broadcaster* (October 1976), p. 30.

[51] On the position of the Department of Communications, see "Ottawa May Take Over Pay-TV, Not Fight It," *Financial Post* (15 May 1976), p. 12; and "Sauvé Keeping Her Hand on the Pay-TV Knob," *Financial Post* (31 July 1976), p. 14.

[52] On the rather different position adopted by the Secretary of State, see "Faulkner Not Pressured Into Pay-TV," *Globe and Mail* (11 August 1976), p. B3; and Blaik Kirby, "Broadcasting Probe Likely to Postpone Advent of Pay-TV," *Globe and Mail* (16 June 1977), p. B1.

[53] On these issues, see "Unified National Policy Urged to Raise Canadian Film Output," *Globe and Mail* (10 November 1976), p. B2.

[54] On the CRTC position, see "CRTC Postpones Deadline for Pay-TV Briefs," *Marketing* (16 August 1976), p. 13; and "Pay-TV a Double-Edged Sword for the CRTC," *Globe and Mail* (11 June 1977), p. 37.

[55] Canadian Radio-television and Telecommunications Commission, "Application for Cable Television Service to Certain Areas of Manitoba," 30 December 1976. It should be noted that the Canada-Manitoba agreement was signed over the objection of the CRTC.

[56] On the Saskatchewan situation, see "Saskatchewan in Tug of War Over Control of Cable TV," *Financial Post* (26 February 1977), p. 36.

[57] On the Quebec situation, see "Quebec Goes Ahead on Pay-TV," *Financial Post* (22 January 1977), p. 8.

[58] *Capital Cities Communications Inc.* v. *CRTC*, [1978], 2 S.C.R. 141; and *Public Service Board* v. *Dionne*, [1978], 2 S.C.R. 191.

[59] For a review of the briefs originally submitted to the CRTC, see Sheri Craig, "The Lines Are Being Drawn," *Marketing* (18 October 1976), pp. 3–4; on the 1977 hearings, see Douglas Mepham, "Picture Goes to Black; Pay-TV's Videotape Jams," *Financial Post* (2 July 1977), p. 5.

[60] For a summary of the major points made in the submissions, see CRTC, *Report on Pay-Television*, Chapter 5.

[61] *Ibid.*, p. 36.

[62] The logic behind the CRTC decision is laid out in *ibid.*, pp. 32–36.

[63] *Ibid.*, Chapter 7.

[64] "Cable Firms Still Fighting for Pay-TV," *Globe and Mail* (14 March 1978), p. B1; Ian Brown, "No Pay-TV for Now, CRTC Rules, But This Is How It Should Work," *Financial Post* (18 March 1978), p. 2; "Cable Firms May Attempt Pay-TV Unless Federal Rules Are Set Soon," *Globe and Mail* (5 April 1978), p. B2.

[65] "We're Going to Have Pay Television," *Cable Communications* 44 (July 1978), p. 31.

[66] "32.8% of Canadians Interested in Pay-TV, Survey Finds," *Cable Communications* 45 (May 1979), p. 9.

[67] On the 1978 federal-provincial conference, see Woodrow *et al.*, *Conflict Over Communications Policy*, pp. 50–51.

[68] Statement by the Hon. James Snow on pay-TV at Federal-Provincial Conference of Communications Ministers, 29–30 March 1978, Document 830–39/019.

[69] Joint Communiqué, Federal-Provincial Conference of Communications Ministers, 29–30 March 1978, p. 2, Document No. 830–39/027.

[70] For a discussion of attempts at constitutional reform, see Woodrow *et al.*, *Conflict Over Communications Policy*, pp. 52–53.

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[96] Canadian Radio-television and Telecommunications Commission, "Extension of Service to Northern and Remote Communities: Establishment of a Committee and of Public Meetings," 8 January 1980.

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[125] CRTC 1980 Hearings, submission number 97.

[126] For the Council of Canadian Filmmakers see the CRTC 1977 Hearings, submission number 58. For the Joint Action Committee see the 1980 Hearings, submission number 215.

[127] CRTC 1980 Hearings, submission number 231.

[128] CRTC 1980 Hearings, submission number 162.

[129] CRTC 1977 Hearings, submission number 18; 1980 Hearings, submission number 123.

[130] CRTC 1977 Hearings, submission number 30; 1980 Hearings, submission number 121.

[131] CRTC 1980 Hearings, submission number 98.

[132] CRTC 1980 Hearings, submission number 4.

[133] CRTC 1980 Hearings, submission number 285.

[134] CRTC 1980 Hearings, submission number 12.

[135] See the submission to the CRTC 1981 Hearings made by the Director of Investigation and Research, Combines Investigation Act.

[136] See the "Intervention Statement" submitted to the CRTC 1981 Hearings by the Consumers' Association of Canada.

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Technological Possibilities and Operational Formats for Pay-TV in Canada

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by
John B. Black,
R. Brian Woodrow, and
Kenneth B. Woodside

Any consideration of technological possibilities and operational formats for pay-TV in Canada must proceed within the context of the multiple and rapid developments taking place as a result of what has become known as the "communications revolution."[1] That term is very much an appropriate one when one considers the magnitude of the changes taking place in communications technology and their potential impact on the overall structure and everyday life of modern man/woman. In the 1980s we find ourselves in the midst of various and thoroughgoing changes in our communications system with important and rapid developments taking place in distribution technologies, mass communications, and computing that open up exciting new possibilities for broadcast programming, information dissemination and retrieval, data processing, and many related activities. Concomitantly, such developments offer promising but still uncertain economic opportunities for Canadians both in the operation of new communications systems and in the supply of the necessary hardware and software. As well, such developments also raise important questions, both old and new, about their impact on Canada's social and cultural future.

From a conceptual point of view, pay-TV is not a particularly innovative or far-reaching development in and of itself. What is normally meant by pay-TV is the provision of additional programming on a discretionary basis for the payment of a premium fee. Pay-TV can be provided by means of standard over-the-air broadcasting or through some type of wired system, and its programming would be primarily of an entertainment variety including recent movies, popular specials, sporting events, cultural programmes, or whatever, all served up with a healthy dose of Canadian content. Whether eventually provided by some consortium of cable operators, by the existing private broadcasters, or by programme production groups more directly, pay-TV will probably be treated operationally as an additional service tacked on to the existing broadcasting system. To many observers, this kind of

90 pay-TV is little more than "old wine in new bottles" — and of course
a higher cost to the thirsty consumer.

91 However, such a harsh judgement on the possible future of pay-T
and the present importance of the pay-TV decision may well be t
92 hasty and short-sighted. The technological potential of pay-TV
already stretching beyond present-day proposals, and considerabl
more elaborate and innovative uses such as interactive two-wa
systems and highly specialized programming will become readil
93 available within the next few years. In this regard, pay-TV is ver
much the entertainment analogue to videotex technology that ca
provide virtually an unlimited store of information on a demand bas
94 and that is currently being pioneered in Canada. As well, pay-TV
95 merely the first of a number of premium services, ranging fro
96 entertainment and information to teleshopping of various sorts
remote sensing services, and the way in which pay-TV is introduce
may well set the pattern for the introduction of other premiu
97 services in the future. Finally, however much one might wish to pla
down or discount the disruptive implications of the introduction
pay-TV in Canada, even the most committed technologist or entr
98 preneur cannot — and will not be allowed to — simply disregard suc
matters as the dangers posed by audience fragmentation and pr
99 gramme siphoning, the opportunities created for expansion of th
Canadian production industry, and the challenge of making pay-T
100 serve Canada's cultural dualism and regional diversity. Acknow
edgement of these wide-ranging implications, as well as recognition
101 the technological potential inherent in pay-TV, strongly suggests th
the pay-TV decision involves more than simply adding something ne
102 to our existing broadcasting system.

This essay expressly takes the view that pay-TV in Canad
potentially represents the advent of a new communications technolog
103 rather than merely the addition of a new service to the existin
104 broadcasting system. Emphasis on the word "potentially" is importa
105 because there are forces at work — and not always only the mo
106 obvious ones — that are attempting to constrict the evolution
pay-TV technology and to structure the pay-TV decision in the
interest. Technological change always mobilizes both its arde
107 supporters and its determined opponents, and the more significant th
change, the more intense will be the conflict. The first section of th
essay makes the case for treating pay-TV as a new communicatio
technology and suggests how that technology could be harnessed
108 the coming years. The second and third sections explore the distrib
tion technologies available and the operational formats possible f
109 pay-TV in Canada. Finally, the essay concludes with some thoughts
the implications of the pay-TV decision as viewed from a technologic
standpoint.

Pay-TV as a New Information Technology

One of the more interesting issues raised in the current debate over the introduction of pay-TV in Canada focuses on whether or not pay-TV potentially constitutes a new technology and what longer-term significance should be attached to the present pay-TV decision. Most commentators, both friend and foe alike, tend to represent pay-TV as basically an extension of the existing broadcasting system (including cable) and not always a very attractive or welcome one. For example, Alphonse Ouimet, former president of the Canadian Broadcasting Corporation and a major figure in Canadian public broadcasting history, articulates what has become the popular view:

> Pay-TV is not a new medium or even a new type of television as some would like us to believe. It is just a different method of paying for TV and we have had it for a long time. Cable TV is a form of pay-TV which charges a monthly fee for a number of TV channels. The kind of pay-TV which is being pushed at this time is per-channel pay-TV. For an extra payment of $10 a month, cable would make it possible for subscribers to the pay-TV channel to see films, after their first run in the movie house, but before their availability on the ordinary channels. Pay-TV would also show the odd sporting event and entertainment special. Its content would be over 90% American and necessarily programmed for the greatest possible mass appeal.[2]

For their part, the technological gurus of the communications revolution in Canada — people like Israel Switzer, Gordon Thompson, and Douglas Parkhill — would probably not disagree fundamentally with the prevailing assessment that pay-TV is being proposed essentially as an extension of the existing broadcasting system, although they would not necessarily agree that this should be so. Switzer, for example, has taken the view that pay-TV will likely be introduced in Canada in such a restrictive and tightly regulated fashion as to deny its technological potential and to inhibit the development of a vibrant and viable pay-TV industry.[3] Likewise, if the CRTC's call for licence applications can be taken as an indication of its thinking on the matter, there is even further evidence that pay-TV is not being considered seriously as a new technology. By framing the pay-TV decision in terms of such objectives as revenue for the Canadian programme production industry, combination of regional services with national services, limitations on cross-ownership, and Canadian content commitments, the CRTC chooses to define the issue as an extension of the broadcasting system and runs the risk of benignly neglecting, if not explicitly denying, the technological potential of pay-TV.

How can such diverse talents coming from such different starting points and drawing such different conclusions hold the same basic view of the future of pay-TV? Thompson provides one possible answer in his discussion of the differences between "information technology" and "industrial technology":

> Conventional pay television is an example of an information technology system based on design concepts derived from industrial technology, where concentration of benefits is a key consideration. The revenue streams that support such a system are simple and centralist in structure, and are easily tapped for the benefit of the entrepreneur. All our "one way," mass communication media are based on this same centralist, concentrated-benefit pattern that served industrial technology so well.[4]

The new "information technology" described by Thompson has quite different characteristics than traditional "industrial technology." For one thing, it moves away from long-standing notions of economies of scale, centralization, and concentration of benefits towards a more self-sufficient, decentralized, "small-is-beautiful" approach to the use of technology. Moreover, it posits the emergence of a true "information market-place" wherein intellectual labour can be converted easily into capital through small-scale production on a simple royalty basis for a diffuse and specialized audience. Finally, "information technology" is portrayed as being relatively accessible to the ordinary person and, when culturally acclimatized to it, highly "convivial" in Illich's sense of the term as a tool people find useful for their education or enjoyment.[5] Pay-TV, in the form it is usually proposed, clearly does not conform to these general characteristics, but, according to Thompson, that is because its potential as an information technology is not being tapped.

Even in its conventional form, however, some of the potential of pay-TV as a new "information technology" becomes readily apparent:

1. If introduced with sufficient variety of channels, pay-TV provides the opportunity for a wide range of programme offerings to serve specific and often scattered audiences that previously would not have been served for purely economic reasons.
2. Pay-TV could incorporate a selective and discretionary payment mechanism whereby the consumer can register his choice of programming, especially in the case of a pay-per-programme or even a straight-time format.
3. Pay-TV could offer access to a wide range of programme originators — not necessarily only the larger film makers but also many small independent programme producers — who could consign their product for exhibition at a specified royalty fee.
4. Pay-TV could be distributed and exhibited, either in pure or hybrid form, using a variety of modes including over-the-air transmission,

cable/satellite hook-up, direct broadcast satellites, common carrier technology, sale or rental of videotapes or videodiscs, among others.

5. An operating pay-TV system can be utilized to provide a variety of non-programme premium services like videotex or remote sensing.

Such a sophisticated and developed pay-TV system as set out here has been described by Thompson as "demand" pay-TV, in contradistinction to the conventional pay-TV presently being promoted where entry and access are tightly regulated by government and the industry itself.[6]

The prospective link between "demand" pay-TV and the videotex technology also being developed in Canada at the present time is particularly interesting. Videotex is in many respects the information analogue to "demand" pay-TV and has many of the same characteristics as the latter technology. Videotex provides information plus some entertainment (although not television programming in the usual sense) through a system that links computers and data bases to an enhanced television receiver that serves as the point of access.[7] The technology can take two forms — broadcast videotex (sometimes referred to as teletext) and interactive videotex. Broadcast videotex can be carried on over-the-air television signals, via satellite or on cable systems, and is particularly suitable for presentation of frequently changing information — news, sports, weather, traffic reports, stock market prices, airline/airport status, and similar special features. In its broadcast version, the videotex signal is carried on the actual television signal in the frame-blanking interval normally seen as the black line at the top or bottom of the television picture. The user selects the page of information he/she wishes to see, and the decoder located in (or attached to) the television set "grabs" it for him the next time it is transmitted and displays it on the television screen. The pages of information are transmitted in a continuous repeating cycle and thus there may be a few seconds' delay before the signal appears. In its interactive mode, a two-way contact is established between the user and the videotex system and the user can access the available information (or pages) in a variety of ways. This contact is now normally established through telephone networks, but the technology certainly exists to provide the same services through cable television or optical fibre links. Beyond videotex, there are a host of other communications/information technologies and services that may be provided by the same electronic links (or at least use elements of these links) and will compete for the same public attention and support — electronic messaging, interactive computer games, remote sensing, teleshopping, and so forth. As part of this broader package of technologies and services, pay-TV should be treated as simply one of many pieces in the increasingly elaborate mosaic of entertainment and information services available to the public at large.

Viewed in this perspective, "demand" pay-TV and videotex represent two parallel lanes on what Parkhill has called the "Electronic Highway" of the future:

> Basic to this picture is a view of the evolution of computing and communications systems that sees them coming together in the form of a universal, functionally-integrated but institutionally-separated information distribution system. . . . Such a network could become the medium for the distribution of a myriad of information services whose number and variety is for all practical purposes unlimited and which would be available to everyone everywhere in Canada. . . . In conclusion, I believe that the future is now inseparably tied to the growth of an *open* Electronic Highway Network that will make the fruits of the Information Revolution available to everyone.[8]

"Demand" pay-TV would be much more than a mere extension of the existing broadcasting system and would have quite different characteristics from present proposals for pay-TV in Canada. If introduced in the proper fashion and at the appropriate time, it could expand and alter the market for programme production, increase and diversify the range of consumer choice, and contribute towards a change in our attitudes as regards information and entertainment. Decisions about the introduction of pay-TV in Canada must thus be taken with due regard that their implications for subsequent decisions on related communications technologies and services are not hampered by the way pay-TV is introduced. Most importantly, foresight is required in understanding and exploiting the vast potential that these new technologies hold.

Methods of Distributing Pay-TV

Technology appropriate for distributing pay-TV to Canadians has been available for some time and is constantly being improved and enhanced. Certain methods of distribution such as over-the-air broadcasting combined with signal descrambling equipment or cable distribution systems that set aside one or more channels for pay-TV purposes can quickly be made operational from both a technological and regulatory point of view. Other methods of distribution such as direct broadcast satellites, which transmit to household dish antennae, are possible if the economic costs are reduced and the necessary political decisions are forthcoming. Still another method of distributing what is essentially pay-TV through the sale or rental of videotapes or videodiscs is becoming increasingly popular and evades many of the difficulties encountered by other technologies. These four methods of distribution should not be viewed separately and in isolation from one another. Rather it should be recognized that all are somewhat interrelated and that the pay-TV system which eventually takes shape in Canada will probably draw upon elements from each of these methods of distribution.

In the conventional sense of standard over-the-air television programming, broadcasting is not the predominant potential pay-TV vehicle in Canada today, but it has been used to a limited extent in the United States and is certainly one of the alternative means available for delivering pay-TV services. In this form, pay-TV employs the over-the-air transmission of an encoded (scrambled) television signal that is then received by individual subscribers using an authorized device to "unscramble" the signal. The "scrambled" signals may be received by all viewers within the coverage area of the transmitting station, thus opening up the possibility of unauthorized reception for viewers who manage to obtain (or construct) a suitable decoding device.[9] Given the finite nature of the radio frequency spectrum and the specific amount allocated to television broadcasting, it would be extremely difficult today to justify the use of this scarce public resource in most heavily populated areas of Canada for the selective programming inherent in pay-TV systems. The frequency spectrum (i.e., channels) required for new over-the-air television offerings is simply not available. At the same time, however, it must be recognized that today's microprocessor technology certainly makes the prospect of utilizing highly efficient, secure scrambling devices and complex, flexible billing systems for broadcast pay-TV feasible and, in certain circumstances, appropriate as a method of distribution.

In the United States, some local subscription television broadcasting stations are currently in operation even though the rapid growth of pay-TV has been based primarily upon the development and penetration of cable distribution systems. The more important phenomenon, however, has been the emergence of conventional, local broadcast television stations that have come to be distributed nation-wide through communications satellite links as added services by local cable television operators. These "super-stations," such as WTCG from Atlanta or WOR out of New York City, thus gain entry to the national market despite their local roots, and, in Canada, these stations are prime targets for operators of illegal earth stations attempting to provide television services to remote or poorly served areas.[10] While no subscription television broadcasting stations have been approved in Canada, they could be put into place quickly and relatively painlessly as part of an overall pay-TV system, except for the fact that the CRTC has reiterated in its recent call for applications that it is not willing to license "super-stations" *per se*.[11]

The predominant pay-TV distribution technology in the United States and Canada will likely be through cable television, which has been the focus of much promotional activity and innovative developmental work in recent years. Based originally on the concept of "community antenna" television systems (CATV) designed to bring remote broadcast signals to under-served or isolated areas, today's cable television technology is capable of delivering more than one hundred channels of programming along with other related services and is being utilized primarily in densely populated urban areas.[12] In the case of such systems, arguments based upon spectrum utilization are essentially eliminated, since the signals are all enclosed within "the cable" (either the coaxial copper cable of today or the optical fibre of the future) and make no use of the "radio frequency spectrum" in the conventional sense. As well, communications satellites of the simple distribution type (mostly operating in the 6–4 GH_z band) have provided pay-TV programming organizations with an efficient and economical means of getting their signals to cable head-ends across the United States. At the present time, existing technology allows cable operators to provide not only general as well as more specialized programming channels, but also pay-per-programme services, videotex, data retrieval, remote sensing (e.g., fire and burglar alarms), and a variety of other possible applications.[13] Thus, the basic nature of cable systems has changed drastically from their early days as "community antenna" television systems.

Although cable systems have been steadily increasing their channel and service capabilities over the past few years, the newly emerging technology of "fibre optics" using common sand as opposed to expensive copper as its basic ingredient has the potential to alter dramatically the range of information and entertainment services available to customers.[14] At this time it is difficult to predict the speed at which optical fibre communication links will be installed, but there can be no doubt that their long-term impact will be considerable. Implementation of fibre optics technology will expand even further the horizon of cable systems, since a bundle of glass fibres the size of a current cable television coaxial cable will have a bandwidth/carrying capacity that is almost infinite. Spectrum limitation arguments go out the window with fibre optics technology, and the practical limitations on the number of programmes and other services that might be carried on a cable system effectively disappear.

The use of communications satellites is also a key feature of pay-TV systems presently in operation in the United States and those being proposed for Canada. Using a geostationary orbit position some 35 000 kilometres above the equator, communications satellites receive signals from ground stations (whether they serve broadcasters, pay-TV operators, or telecommunications carriers) and then retransmit them to other earth stations (distribution points, cable head-ends, broadcasting stations, or even home receivers). These "relay towers in the sky" provide a most efficient means of distributing television signals to widely separated geographical locations and render distance largely irrelevant in the cost structure of programme distribution.[15]

One problematic aspect of the provision of pay-TV by cable distribution has traditionally been the matter of billing and monitoring. Cable television is itself a rudimentary form of pay-TV, premised upon payment of a certain charge per month in return for attachment to the cable that provides access to an expanded range of channels. Once pay-TV is offered as a service on cable distribution networks, it becomes necessary to add some kind of "descrambling" device to the receiving set in order that the signal can be protected from those who have not subscribed to the service but made available to those who do pay for the service. Various devices are available to accomplish this purpose, from simple "negative trap" arrangements presently favoured by most cable operators to more elaborate "black box" technology developed by Bell Canada whereby the customer could select and pay for only the programmes desired and additional discretionary services could be easily added.[16] Whatever monitoring and billing procedures are adopted for pay-TV will undoubtedly be important in influencing the pace of technological development and the emerging pattern of industrial structure.

Cable television has thus moved well beyond its original purpose, and the provision of pay-TV service has become one of its major selling points. In the United States, the availability of pay-TV services such as those provided since the mid-1970s by Home Box Office, Showtime, and other packagers has been used most effectively by cable operators to increase their penetration of existing markets dramatically and to promote their case for entry into areas where cable television had not previously been available.[17] In Canada, however, the situation has been somewhat different because even without pay-TV, the country has a much higher level of penetration by cable television than the United States. Canada's cable operators have been anxious to offer their existing and future customers this additional (and potentially very profitable) service primarily as a way of further tapping their market, consolidating the rapid growth of their own industry, and spawning the creation of a related pay-TV industry. The cable-satellite link in the distribution of pay-TV is important because for the first time it gives cable a network capability *vis-à-vis* the broadcasters. As well, the emergence of a pay-TV system with cable as the predominant exhibitor may well provide it with a solid base upon which to compete with the telecommunications companies and others in the provision of additional, often non-broadcast, services.[18] Despite the differences between the American and Canadian situations and viewed purely from a technological point of view, cable presents itself as the most obvious method of distribution for pay-TV in Canada. When the CRTC finally gets around to issuing licences for pay-TV in this country, it is inevitable that cable will play a large role in the eventual system, but what is not so clear is the extent to which limitations will be imposed on the ability of cable to take advantage of its position.

In addition to their relay function, communications satellites have the potential for becoming a third distinct distribution technology. The feasibility of direct broadcast satellite systems that can distribute programmes directly to the home using dish antennae as household receivers was demonstrated in the Hermes experiments of the mid-1970s in Canada, and a proposal to establish an operational pay-TV direct broadcast satellite service has recently been filed in the United States.[19] At present, the major obstacles to the development of such a system include heavy costs of building and launching the satellite, the maintenance of uplink facilities, and the installation of home receivers, but, in each case, marginal costs are declining rapidly and coming more into line with alternative options. In rural and less populated areas, direct broadcast satellites may be the most viable means of distributing pay-TV, videotex, and perhaps even conventional television programming, but in most urban or semi-urban areas, the combination of distribution satellites linked to the head-ends of cable systems is the most probable option for the short to medium future.[20]

Video recordings must also be considered in any list of pay-TV technologies, since they provide an alternative and radically different form of programme distribution. Cassette videotape recording units have been on the market for several years and have achieved a considerable level of use in spite of their relatively high cost. This technology was developed from the recording devices used in the broadcast industry, and, in the past decade, units for the home market have evolved into the now familiar "cassette" with two main technical standards (VHS and Betamax). Some full-length feature motion pictures are available along with limited examples of speciality programming, but this market has not developed as rapidly as might be expected. The ease with which the technology can be used to copy programme materials has certainly dissuaded some major motion picture companies from releasing their material for videotape distribution.[21] As recording devices, their greatest use has probably been to pirate off-air broadcasts, while the largest single category of pre-recorded video cassettes sold in the United States for use in the home today is pornographic materials. Videodisc units are just coming on the scene and probably hold greater promise as pay-TV distribution vehicles, since they are play-back only (and thus ease some of the worries of the programme distributors regarding copying activities) and will be able to offer programmes at lower unit costs. While there are several competing systems emerging, videodisc technology basically involves the recording of programme material in digital form on a flat, usually flexible, recording surface that is inserted into a play-back unit conceptually akin to a record player. At this point in time, these systems are just entering the market-place and there are a number of compatability problems still to be sorted out, but, nevertheless, they should be considered as important elements of any overall approach to pay-TV in the United States and Canada. Moreover, this task is made particularly difficult because videotape and videodisc technologies operate essentially outside the scope of established regulatory practice, except for explicit sanctions imposed under the criminal law, and thus pose quite different problems than those raised by more conventional methods of distributing pay-TV.

Operational Formats for Pay-TV

Looking at pay-TV as a new information technology rather than as merely an extension of the existing broadcasting system likewise raises important issues about what operational format should be adopted at the time of its introduction. First of all, there are crucial choices that must be made concerning the basic configuration that pay-TV will take in Canada — a single pay-TV service or some multi-tiered arrangement of available services, monopoly control of service provision versus some degree of limited competition, one national service and/or regional services. The simple notion of a single licensed pay-TV service such as was originally envisaged by cable operators during the mid-1970s has likely become a casualty of the repeated delays and flood of alternative proposals advanced by other groups interested in pay-TV. Given the rapid advance and expanding range of choice occasioned by continuing technological change, it may well prove fortunate that precipitous action was not taken to introduce such a rigid and limited form of pay-TV. Current consideration seems to focus on a "tiered" structure of discretionary services each with its own appropriate pricing tariff and including a basic subscription rate for basic cable service or any other local delivery mode, one or more mass-appeal pay-TV channels available for an additional fee, and more specialized or target programming also available at a modest additional fee.[22] Such a "tiered" structure for pay-TV, as seems to be envisaged by the CRTC, provides desired flexibility so far as future expansion and modification of the service itself are concerned and also encourages creativity and innovation in exploiting the potential of pay-TV as an "information technology."

Monopolistic solutions that foresee a single agency being created to take charge of the introduction of pay-TV seem likewise to have been discarded, and there seems to be considerable support for at least limited competition among licensed pay-TV distributors. The notion of cable operators coming together with broadcasters and programme producers to distribute pay-TV service co-operatively has some intuitive appeal but, upon serious reflection, flies in the face of fundamental differences of interest among the parties concerned, and would probably result in a "common denominator" service that would exploit neither the technological nor the programming potential of pay-TV.[23] In this regard, the concern being expressed about providing regional as well as national service is further evidence of sensitivity to the potential of pay-TV. Specific regional pay-TV services licensed along with a national service will help to ensure that this new technology is not dominated by any single national conception of what is appropriate programming and will provide a better opportunity for pay-TV to respond to diverse customer interests in different parts of the country. At the same time, however, caution and foresight must be exercised so that a multi-tiered, competitive, national/regional pay-TV configuration is introduced that is not so elaborate and so costly as to undermine the capacity of the emerging pay-TV industry to serve its potential customers.

A second major consideration bearing upon the operational format that pay-TV will take in Canada concerns the appropriate charging mechanism whereby service will be provided. This issue can be examined on three levels. First of all, there is the choice between some form of universal service *vis-à-vis* discretionary service. A universal service would mean in practice that all cable subscribers would automatically receive the pay-TV package as part of their cable service — whether or not they wanted the service expressly — and a specified amount would simply be added to their monthly cable fees. The major advantages to such a universal approach would be that it would minimize hardware, installation, and marketing costs, keep the cost to the individual subscriber relatively low, since the size of the subscriber base would be maximized, and provide a relatively secure and certain revenue yield upon which to ground the emerging pay-TV industry. There are some major disadvantages to this approach, however, not the least of which is that a universal service would be compulsory, removing any effective consumer discretion unless the subscriber chose simply to stop receiving cable service entirely, and fostering the emergence of a pay-TV industry along monopolistic, public-sector lines.[24] It is interesting to note that the CRTC, in its call for applications, more or less precludes a universal service and prescribes a discretionary approach.

Given the probability that discretionary, premium services are most likely to be licensed, there is still the matter of choosing between a charging mechanism based upon a pay-per-channel or pay-per-programme principle. The pay-per-channel mode, which could be distributed either by cable or over the air, would force the potential subscriber to decide whether or not he/she wants pay-TV service that, if desired, would be provided for a flat monthly fee. The cost to the subscriber would be considerably higher than under the universal approach, but, on the other hand, the potential subscriber would have somewhat greater freedom of choice and, at least in the case of cable distribution, would incur no additional cost in terms of hardware required to receive such a service.[25] The pay-per-programme mode is more sophisticated in conception with pay-TV programming being provided in scrambled form so that each subscriber would require a decoding device to unscramble the particular programme that he wished to view, and the pay-TV operator would then collect data on usage and bill him/her only for programming viewed. Among the most important advantages of a pay-per-programme mode is that it significantly increases the subscriber's freedom of choice, and, because of its selective and interactive capability, it opens up the real possibility of offering other "in-home two-way metering services" in the future. One short-term disadvantage of the pay-per-programme mode is the present high cost of descrambling hardware, but continued advances in microelectronic technology suggest that cost will not be a major inhibiting factor in the years to come.[26] Consequently, in terms of economic feasibility and short-term acceptability, the pay-per-channel mode is clearly the most likely charging mechanism to be adopted, but such a choice should not be made without acknowledgement of the basic superiority of the pay-per-programme mode and explicit provision for review and possible adoption of the latter mode at some point in the medium-term future.[27]

Finally, there is the issue of determining the appropriate level of Canadian programming to be prescribed when pay-TV service is eventually introduced in Canada. During the 1970s, specific Canadian content requirements imposed on radio and television stations have become a major feature of broadcast regulation, but the real success of this policy initiative is very much in doubt.[28] At the same time, a vigorous but not always authentic domestic production industry has emerged that requires financial incentives and other encouragements in order that a continuing stream of Canadian programming will be available in the future. The introduction of pay-TV in Canada raises the question of commitment to Canadian programming in a new and different form. On the one hand, some percentage of exhibition time or programmes acquired might be specified as an appropriate indicator, but such a prescription might well inhibit initial public acceptance of the new pay-TV service and elicit the same kind of grudging and equivocal response that private broadcasters presently accord to Canadian content requirements. On the other hand, diversion of some percentage of gross revenues to the domestic production industry is also a possible indicator of commitment to Canadian programming, but this course of action runs the risk of taxing the ability of the industry to produce enough quality Canadian programming while not satisfying the basic demand for pay-TV entertainment on the part of the consumer. While the CRTC has not indicated exactly how it intends to measure this element (and is also at the same time conducting an overall review of Canadian content regulation), it has indicated clearly that "commitments to Canadian programming . . . will be a major consideration in the Commission's decision as to which applicants may be licensed."[29]

Several aspects of the "commitment to Canadian programming" issue deserve comments in light of our argument that pay-TV should be regarded as a new "information technology." As a general rule, such a perspective would tend to downgrade the importance of this consideration in decisions concerning an operational format for pay-TV in Canada. First of all, discretionary services, by their very nature, are less suited to the imposition of detailed content restrictions than universal services that, in effect, represent a disguised tax on the subscriber rather than a voluntary market transaction under conditions of full and free information. Secondly, the major consumer interest in pay-TV lies in the availability of recent first-run movies and, to a lesser extent, special event presentations, and if pay-TV is to be a marketing success and have any beneficial effect on Canadian programming, this basic demand will have to be satisfied. Thirdly, the new "information technology," of which pay-TV is only the "leading edge," will increasingly make content regulation difficult if not counter-productive as is most clearly evident in the case of videotapes and videodiscs. What this means for the introduction of pay-TV is that "commitment to Canadian programming" can be legitimately and usefully applied to prevent disruption of the existing broadcasting system , but it should not be pushed so far as to inhibit the evolution and acceptability of the new "information technology."

Implications for Policy

By way of conclusion, let us briefly bring together some of the policy implications of pay-TV considered as a new "information technology."

The most general implication of any choice of technology made with respect to pay-TV will be its impact upon related technologies and services. Since pay-TV is potentially part of a whole range of information services that will be introduced over the next decade or so, and as the various potential information distribution systems are gradually merging, it is important from a technological point of view that the decision provide for maximum flexibility for adoption of new technologies. In this way, any pay-TV system that is authorized could be readily meshed with other information services. For instance, Parkhill has suggested that hybrid solutions that interconnect cable and common carrier equipment within a common system can both overcome high fixed capital costs that might face a single industry (like cable) attempting to provide these services and, at the same time, allow a wider variety of institutional actors to provide the services.[30] The critical consideration is that any choice should not lock the system into a particular technology at a time of rapid change and when the common computer and telecommunications technologies are merging. This is important not only from the point of view of not constraining the impact of potential technologies but also because of the possible impact pay-TV and other information distribution systems can have on the wider economy.[31] Any viable industrial strategy for the communications sector requires the development of a domestic market for the commodities that are being encouraged. In order for pay-TV and related information distribution technologies to stimulate technological innovations and growth in the communications equipment-manufacturing sector, the choice of system will have to be capable of providing opportunities for this equipment to be integrated into the market, either initially or in the near future.

A second policy implication of our discussion relates to the recent interest in separating content and carriage for purposes of regulation.[32] A major impetus for proponents of this distinction is the possibility that it would provide a framework for the resolution of federal and provincial policy differences concerning which level of government should regulate communications policy. The key assumption behind this distinction is that carriage does not influence content. There are certain difficulties with this distinction. For instance, economic considerations tied to the cost of the service and the character of the resultant audience do have an influence on the content presented on the medium both with respect to who can afford the service and, as well, with respect to the blend of entertainment services that will maximize revenues. Furthermore, technological factors are important in so far as the choice of pay per channel will make it easier for the less popular Canadian content to be integrated into the programme schedule than would be the case with a pay-per-programme format. All this suggests that the carriage/content distinction should be approached and used with some care, since it clearly has some limitations in so far as its capacity to differentiate distinct activities.

A final implication of the new technologies related to and including pay-TV is their potential impact on individual choice. Whereas over-the-air broadcasting services are inherently one way in character, the new technologies have the capacity to be two-way or interactive. While in the short term it may be possible to minimize the extent of individual choice via, for instance, a 'per-channel' format for providing pay-TV, in the longer run the competition from videodiscs and videotapes as well as future reductions in the costs of equipment to provide pay-per-programme pay-TV will make it increasingly difficult to continue with a more restrictive per-channel format. As the capacity for individual choice increases, the ability of regulatory authorities to enforce Canadian content restrictions as a collective norm is also bound to be threatened, and Canadian productions will be successful only in so far as they can satisfy a market. Thus, while regulation may make it possible initially to limit the exercise of individual choice, in the longer term this will only be sustainable through severe restrictions on technological development and application.

Notes

[1] For a discussion of this term and its applications to the Canadian situation, see Canada, Department of Communications, *Report of the Communications Research Advisory Board, 1979* (Ottawa: Minister of Supply and Services Canada, 1980), pp. 1–2.

[2] Alphonse Ouimet, *Rationalizing Canadian Telecommunications: A Plan for Action*, report prepared for Project Delta, GAMMA (Montreal, 1978), p. 88.

[3] Israel Switzer, "New Directions for Cable," *Broadcaster* (December 1978), pp. 30–31; and "How I Learned to Love the Satellite," in Peter S. Grant, ed., *New Developments in Communications Law and Policy* (Toronto: Law Society of Upper Canada, 1980), pp. 169–80.

[4] Gordon B. Thompson, *Memo from Mercury: Information Technology* Is *Different* (Montreal: The Institute for Research on Pubic Policy, 1979), p. 9.

[5] *Ibid.*, pp. 5–8.

[6] *Ibid.*, p. 36.

[7] On videotex technology, see John Madden, "Teledon in Canada," in Peter S. Grant, ed., *New Developments in Communications Law and Policy* (Toronto: Law Society of Upper Canada, 1980), pp. 301–29.

[8] Douglas Parkhill, "The Necessary Structure," in Dave Godfrey and Douglas Parkhill, *Gutenberg Two: The New Electronics and Social Change* (Toronto: Press Porcépic, 1979), p. 92.

[9] On the sometimes overlooked potential of over-the-air distribution, see Hugh Edmonds, "The Big Picture," *Cinema Canada* (August 1976): 12–16.

[10] See Lydia Dotto, "Earth Stations: Dishing Up a Revolution," *In Search* 7 (Winter 1980): 2–11.

[11] Canadian Radio-television and Telecommunications Commission, "Call for Applications for Pay Television Service," Ottawa, 21 April 1981, p. 5.

[12] For a treatment of the growth of cable in the United States, see John Wicklein, "Wired City, U.S.A.: The Charms and Dangers of Two-Way TV," *Atlantic Monthly* 243 (February 1979): 35–42.

[13] On the evolving potential of cable television, see "Cable TV Coming of Age," *Newsweek* (24 August 1981): 44–49.

[14] See Jean-Marc Fleury, "The Light Wave and Glass Race," *In Search* 7 (Summer 1980): 2–11.

[15] On this point, see Robert E. Button, "Cable TV in Orbit: A Look at the Link Between Cable and Satellites," *Canadian Patent Reporter* 20 (1975): 61–76.

[16] For a description of Bell's "black box," see Bob Kenedi, "Editorial," *Telesis* 7 (January 1980), p. 1.

[17] On the growth of HBO and other pay-TV distributors, see Barry Litman and Susanna Eun, "The Emerging Oligopoly of Pay-TV in the U.S.A.," *Telecommunications Policy* 5 (June 1981): 121–35.

[18] The role of non-broadcast services is discussed in Switzer, "New Directions for Cable," p. 31.

[19] For a treatment of this option for distributing pay-TV, see Vincent Sardella and Kim Degnan, "Satellite Broadcasting to Homes: Service Options, Policy Issues, and Costs," *Telecommunications Policy* 5 (June 1981): 84–101.

[20] On the Canadian situation, see O.S. Roscoe, "Direct Broadcast Satellites — The Canadian Experience," *Satellite Communications* (August 1980): 22–29.

[21] On some of the problems relating to video recordings, see G. Chalmers Adams, "Videocassettes Pose Copyright Problems," *Broadcaster* (January 1978): 12–16.

[22] For example, see the Therrien Committee's discussion of a "tiered" service in Canadian Radio-television and Telecommunications Commission, Committee on Extension of Service in Northern and Remote Communities, *The 1980s: A Decade of Diversity: Broadcasting, Satellites, and Pay-TV* (Ottawa: Minister of Supply and Services Canada, 1980), pp. 56–57.

[23] On the conflicts among interests in the field, see Robert E. Babe, "Broadcasting in Canada: In Whose Interest?" *In Search* 7 (Summer 1980): 20–27.

[24] For treatment of these matters, see Canadian Radio-television and Telecommunications Commission, "Pay-Television Background Paper: Universal Pay-Television" (Ottawa, 1978).

[25] On the pay-per-channel mode, see Canadian Radio-television and Telecommunications Commission, "Pay-Television Background Paper: Subscription Pay-Television" (Ottawa, 1978).

[26] On the pay-per-programme mode, see Canadian Radio-television and Telecommunications Commission, "Pay-Television Background Paper: Pay-Per-Program Pay-Television" (Ottawa, 1978).

[27] This danger has been recognized. See CRTC, *The 1980s: A Decade of Diversity*, p. 77; and CRTC, "Call for Applications for Pay Television Service," p. 7.

[28] For an interesting critique of Canadian content regulation, see M. J. Trebilcock *et al.*, *The Choice of Governing Instruments: Some Applications*, Regulation Reference Technical Report No. 12 (Ottawa: Economic Council of Canada, 1981), Chapter 2.

[29] See CRTC, "Call for Applications for Pay Television Service," pp. 10–11.

[30] Parkhill, "The Necessary Structure," pp. 69–93.

[31] Shirley Serafini and Michel Andrieu, *The Information Revolution and Its Implications for Canada* (Ottawa: Minister of Supply and Services Canada, 1981), pp. 29–38.

[32] Lewis Auerbach, "The Distinction Between Carriage and Content," *Telecommunications Policy* 5 (March 1981): 3–11. Auerbach's analysis refers to videotex systems, but much of the argument can be applied to pay-TV as well.

Pay-TV: Jurisdictional and Regulatory Issues

4

by
Stan Feldman
and
Hudson Janisch

Our topic sounds ominously technical and boring. Our intention is to be neither. As this volume is aimed primarily at non-lawyer policy makers and, fortunately for all concerned, there have been a number of excellent recent publications of a technical, but we hasten to add far from boring, nature on broadcast regulation and associated jurisdictional issues, we have resolved to deal with our subject at a non-technical and, hopefully, interesting level.[1] We have, however, included detailed notes and sources for the more determinedly dedicated among our readers. Our design is to capture the dynamics of the challenge of pay-TV to the regulatory system without suffocating that story in unnecessary detail.

Introduction

In Canada, it would appear that pay-TV is going to be treated as a means and not an end. This represents the fundamental difference between Canada and the United States with respect to pay-TV.[2] Most recently, the Therrien Committee has reinforced this means status in its "unanimous" conviction that ". . . the chief justification for introducing pay-TV into Canada must lie in the opportunity it would afford as a stimulus to the program-production industry and the provision of new services."[3] Indeed, throughout Canadian communications history, the regulatory powers that be have moved beyond the interest of the individual to high ideals of national identity.[4] In Canada a "mass" medium has usually meant that its relevance to the individual is made secondary to the supposed interest of the mass.[5] This leads inevitably to two profoundly difficult questions that underlie all the immediate legal and jurisdictional issues of the day. Who decides the interest of the mass? How is this done effectively and efficiently?

Pay-TV represents the most recent example of the decision-making process that ultimately arbitrates the nature and character of communications in Canada. In the United States there is a vitally functioning pay-TV system that has as its major guide the requirement of the market-place — the cumulated desires of each individual consumer.[6] The ultimate form of pay-TV is considered to be the per-programme choice, which elevates the status of the individual over the mass.[7] Thus, in the broadest terms, we see the United States moving toward the culmination of a free broadcast system. In Canada, on the other hand, we have a process that mandates the service of national interests, possibly at the expense of the individual. Which approach is more appropriate for Canada will, no doubt, be long debated. It may even be that the market will overtake the decision-making process and render the whole issue moot.[8]

Anyone with an interest in any aspect of Canadian pay-TV quickly realizes that there is no single overriding and commonly accepted definition of "pay-TV." For years now, Canadians have seen headlines filled with the secondary pay-TV questions — "When do we get pay-TV?" "Who will run it?" "How will it work?" Lack of progress to date towards implementing a Canadian pay-TV system has been because we have, for one reason or another, refrained from coming to grips with the one serious question — "What is pay-TV?"[9]

It has been suggested that pay-TV represents a "last chance" for Canadians to control their own broadcasting system. This approach may well run counter to the very nature of communications in a free society.[10] It might have been appropriate in earlier times to "regulate and supervise" the broadcasting system to avoid the chaos that could result with entrepreneurial enthusiasm coming up against the technical limitations to the radio spectrum. We are now, however, beyond those early technical limitations with cable in place and with fibre optics and direct broadcast satellite to come.[11] There appears to be a need for a dramatic shift of emphasis from regulation and supervision to enhancement and promotion of the Canadian communications capability. This critical time in the evolution of our communications system appears to call for the unleashing of the dynamic forces to be found in the market-place.[12] These forces should be encouraged to reach for the limits of the possibilities that now exist at this threshold of the new information era.[13]

The most serious question raised by the subject of pay-TV is whether the Broadcasting Act and the Canadian Radio-television and Telecommunications Commission (CRTC) are capable of dealing with the larger issues involved. Pay-TV has a role to play alongside of computer-communications, fibre optic and/or satellite transmission, videocassettes and videodiscs, two-way cable service with its vast array of potential services, microelectronic applications, laser communications, high-fidelity television, and the other emerging technologies of the new era.[14] It would appear that the role of pay-TV will not be an "ultimate issue" but merely one link in a series of new means that are coming together to create new communications networks.

Is the central issue, then, still appropriately one of control?[15] Do the people of Canada prefer that their viewing choices be controlled by intermediaries, or would they prefer to be free to choose what they want to see, especially if they pay to see it in their own homes?[16] Have Canadians ever been given this type of choice? Has not the abundantly apparent preference of Canadians for foreign programming already largely pushed aside the CRTC in its intermediary role of fostering a "predominantly" Canadian broadcasting system?[17]

Has the issue of Canadian content been moved to the periphery by the unfiltered will of the Canadian people aided by the force of the new technologies? Is the subject at issue really one of free communication or is it one of communicating Canadian content? Should Canadians focus as much on pay-TV or is it more important to assess the larger questions related to the new information economy? The Broadcasting Act and the CRTC only deal, at best, with one half of the new equation — information. Yet the two ingredients are inextricably bound together.[18] Should the CRTC be responsible for shaping the introduction to Canada of the information economy? Is it equipped to do the job? Should it be? Is a regulatory agency by its nature capable of nurturing competitive services and new entrants in an environment already populated by its progeny for whom it must inevitably feel an obligation to ensure continued economic well-being?[19]

The constant obvious question, still far from resolved after all these many years of discussion and study, remains, "What is pay-TV?" What is its essence? Is it public or private in nature? Is it an integral part of the Canadian broadcasting system or an add-on to it? Is it to enhance the individual's freedom of choice or to promote the broader national good? Is it a business, culture, or both? If both, what is the best mix? Is it the forerunner of the "Information Age" or just one additional small component? Is it a saviour of Canadian culture or a more efficient vehicle for the importation of foreign programmes? Is it part of broadcasting, culture, business, social mores, political power bases, education, entertainment, or all of the above? Is it better left to the control of the provincial or the federal government or to both? Or to neither? Does the answer always depend on who asks and on who decides?[20]

There are many other questions. Why has the issue not been resolved in a timely manner? What has been the cost to all Canadians of the lengthy but inconclusive decision process? Is this decision process appropriate? What are the alternatives? How has the "unity" of Canada been strengthened by the decision process? Does this process make a significant contribution to the policy established in the Broadcasting Act? What do we learn about ourselves as a people for having left this issue unresolved for so long? Is the system effective anyway? Who tests its effectiveness? How? Does the lawyer have a special role to assure that the integrity of the decision-making process is maintained? If the "integrity" is maintained, but the results are not acceptable, is this sufficient? Who decides what is an "acceptable" outcome from the process? Is it enough that the public's faith in the decision-making process is upheld? Does the public care about the process or are they more concerned about the end results that affect them? Can the CRTC explain the spread of American programming via cable to nearly all parts of Canada, which goes so far to undermine its ostensible objective of a predominantly Canadian broadcasting system as a result of the process or because of its concern about public reaction to the end result? What is it that guides the decisions of the CRTC? We know they are bound to interpret and apply the Broadcasting Act, yet within these broad boundaries are vast areas of discretion that surely must be subject to some limits other than the personal preferences of CRTC commissioners.

In the United States it has all become relatively simple. They too were stranded on a reef of questions very similar to the ones set out above. But it was determined that, in its essence, pay-TV is a business. With this singular clarity of purpose, all of the policy doubts were lifted. The simplicity of the resolution and the forces of enterprise have catapulted pay-TV to the forefront of a new business frontier.[21] Their understanding appears to be that the emerging "Information Society" will be that much closer to fulfilment with a full-fledged active cable system in place. And now, in but a few years they have come from well behind us in the cable field to a lead that will likely last forever. (Was it any different in the case of radio and television?)

What will our response be this time? Will we do it again — "sell out" to the public? This would appear largely inevitable because the entire process obtains its integrity and its very legitimacy from fulfilling the interests of the public. Any other course in a free society would be ultimately self-defeating. We know this from our radio and television experiences that the public has had its way.[22] It will again. The real questions are when? And how?

The Key Players

The main people who will decide what pay-TV will be are the members of the CRTC. Among this group, somewhat more equal than the other members, is the chairman. The chairman sets the tone and style for the Commission. He, in turn, is directed by the Broadcasting Act,[23] the Radio Act,[24] and the Canadian Radio-television and Telecommunications Commission Act.[25] The well-known broadcasting policy established in section 3 of the Broadcasting Act provides the outer limits within which the CRTC must place a pay-TV system. These limits are broad no matter who interprets them, but their essence has been distilled over the years to require significant

Canadian-made programming to sustain the rationale of the entire system.[26] Without this Canadian content the broadcast system cannot, it is said, achieve its primary objective of strengthening Canada as a unique social, political, economic, and cultural entity.

With such a large and critical objective, it is not surprising that there are other powerful political entities that wish to influence the evolution of the broadcasting system. As well, the prospect of large profits that may come with a licence to run a television and/or radio station brings strong involvement from the private sector.[27] Thus intervention in the regulatory process comes from both the public and private sectors in terms that are commensurate with their respective stakes in the outcome in the different issues over time.

Until recently, the most significant political input has been from the federal level. However, coincidental with the advent of pay-TV has come a surge of provincial interest in the subject of communications.[28]

As an independent regulatory authority, the CRTC's mandate is to move between these two levels of government, neither acceding to nor ignoring them. Its guiding star is the "public interest," and therein lies the link and source of difference between the two levels of government.[29] There is friction because resolutely held definitions of the public interest are at times, and all too often, diametrically opposed. With the CRTC and federal and provincial governments (in their various emanations) jealously guarding and promoting the public interest as they see it, it is often not that clear who at any given time acts in the interest of the public.

The federal government's view appears to be that it is the trustee of our national image. It alone can express the broader viewpoint and also safeguard us from erroneous (or at least foreign) images that will get in the way of understanding and appreciating just who we Canadians really are. It also wishes to protect us from the fragmenting effect of the narrower views of provincial or regional positions. Our interest as a nation, it is suggested, is larger than that of any one of several provinces, and the idea of Canada must be fostered positively by the federal authorities through the broadcasting system.[30] Despite all its high-sounding rhetoric, the federal position may well lack a firm base. Lip-service about a Canadian system notwithstanding, we have had the American television system delivered to our homes.[31] Why is there such a gulf between our broadcasting system's articulated objectives and day-to-day realities? Why does the high culture view still hold such prominence with the federal authorities[32] when it appears to be largely irrelevant to the vast majority of the Canadian public?[33]

The provinces, although not united on all issues, see the world of pay-TV from a very different perspective. Their interest in the cultural component, with the exception of Quebec, is secondary to their interest in the economic opportunities that pay-TV may bring. They see it as a large step towards the new information era.[34] Information is recognized as a valuable commodity with an ever-widening utility in the market-place. Pay-TV is seen as but one of many possible converters of information into economic and industrial capital and as part of the base that will allow for other new businesses to come into being.[35] The provinces want to guide these information engines in a way that will best respond to the needs of their respective provincial priorities and objectives. They wish to control the growth industries that come along with, and are part of, the new communications sector. To do this, they want to have a major voice in how pay-TV develops.[36]

The place of the private sector within the broadcasting system has been subordinate — in theory. In that reality known as the business of communicating, it is the private sector that most often wins its way.[37] Private broadcasters are more frustrated because of the time it takes to achieve their objectives rather than any failure to achieve what they decide is important to their interests. However, it must be noted that the private sector is no longer united in common purpose. The broadcasters have interests that are inimical to those of the cablecasters. And the telecommunications players have interests that reach beyond the entire broadcasting system and all the other players.[38] With so many vitally involved players it would not be remiss to ask how well the public interest and the public's interest are being cared for, and by whom.

Until the advent of pay-TV, most television has been defined by the sponsors as a means of passing on information and influencing the public in favour of certain goods and services. Programming has been recognized as an important but secondary component. And it is very clear that he who pays the piper — the sponsor — dominates the system and calls the tune.[39] Pay-TV challenges this basic equation. The person who pays the piper in the pay-TV system is the individual consumer. It follows that the consumer with his dollar vote will decide in a much more direct manner than before what he will or will not see. With free television he could turn the dial, but with pay-TV he can stop the show. Power, at last, is moving into the market-place and to the consumer. This prospect might well concern the CRTC as it, like the sponsor, will lose control over the system. With abundant channels to programme and a consumer willing to pay as he determines for programmes he wants, there is really little room left for the CRTC to influence the broadcasting system. This might explain, at least in part, why we have wandered so long through the issue of pay-TV without resolution. As well, should an extensive system of pay-TV be put in place, the federal position will become even less feasible and, ultimately, almost irrelevant. This same scenario, on the other hand, is regarded as a positive factor by the provinces. They see the development of a mechanism and a habit that will lead to payment for other services that can be piped into the home. These services will mean new businesses, more jobs, and more opportunities at the local level. The provinces want to be involved from the start and gain as much control over this development as they can. In pay-TV the stakes are high and they are very real.

Each of the key players has been at the pay-TV game for some time. They are very organized and ready to react to each change very quickly. The one player with the largest final interest is the least organized and the least ready to react and represent its views. Although the impact of pay-TV may not be dramatic at first, since none of the established players know the degree to which it will affect their position, each is jealously guarding its own interests. No one wants to lose. It is the CRTC's function to arbitrate among these parties through its regulatory and supervisory authority. The federal and provincial governments have their areas of interest to promote. A view of the policy battle front reveals that the only party not adequately represented is the public. How will its interests be heard and advanced?

The courts have thus far played a small but important role in the dynamic largely, as we will see, in helping to set procedural ground rules. It may be, however, with the stakes so high, the issues so interwoven, and the players so adamantly apart, that the courts will provide, out of necessity, a forum for the resolution of differences. This would not be in any of the players' interests, but it is becoming more of a likelihood as time passes without resolution within the system. Recently, CTV took the quite novel step of challenging the CRTC directly in court over the terms of its licence renewal. CTV has, in effect, issued a warning that it will not comply meekly with dictates from the CRTC that conflict too sharply with its interests. The central authority of the CRTC and the whole way it conducts its business have thus been challenged.[40] Whether the CTV network wins its case or not, it has established an important precedent in this response. Licensees may now add the courts to the arsenal of weapons with which they seek to turn the system to their own ends. If nothing else, other licensees will see that a foray into the courts can buy time and at least temporary respite from costly regulatory decisions.

This move towards the courts is not likely to end with the CTV case. Established interests in the free television business seem to feel that their market has stopped growing at the highly profitable rates of the 1970s. With pay-TV on the horizon, their collective assessment is that their business will grow at a lesser rate, and in some situations they will not survive the pay phenomenon. Thus, it could be that an anxious licensee will resort to the courts as a last effort to retain the viability of its franchise. Seen in a broader context, the CTV case is an important symptom of a fundamental change that is taking place in the regulation of the Canadian broadcasting system in which exhortation and moral suasion are giving way to legalism and sanctions.

Who Decides?

The CRTC was created by the Canadian Radio-television and Telecommunications Commission Act.[41] It is the successor to other bodies that were entrusted in one way or another with the regulation of the broadcasting system. As an independent regulatory authority the CRTC has considerable autonomy to execute the powers conferred on it by the Broadcasting Act. Its mandate is ". . . to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3."[42] The CRTC has established its own rules of procedure and has issued six sets of regulations that cover AM and FM radio stations, television and cable operations, as well as information returns and licence fees. Not only can the CRTC issue regulations with respect to its mandate, but of equal importance is the power it has to issue, amend, or renew broadcasting licences. The CRTC can attach conditions to licences and it can hold public hearings in aid of meeting its responsibilities.[43]

The overriding principle that formally governs the CRTC in the use of its powers is that its acts and actions must be in aid of the implementation of the broadcasting policy. This provides for a very broad area of discretion. One may readily verify this by noting that, via regulation from the CRTC and its predecessors, our broadcast system has evolved from being predominantly public to one in which the private sector has largely come to dominate.[44] This is more surprising when it is seen that the formal objectives or goals of the different regulatory bodies, including the CRTC, have not changed that much over the years.

The CRTC has an arsenal of means by which it can move the players in the broadcasting community that leaves little room for direct challenge from any quarter to its authority. Although the Governor in Council (the Cabinet) has retained a limited power to issue directions to the CRTC, these must be general and not applicable to specific licence applications or rule making.[45] Similarly, the Governor in Council can "set aside" or "refer back" any licence issue, amendment, or renewal for a second hearing by the CRTC. In doing this, there must be specified what matter was "material" and was either not considered or inadequately considered. And, after a second hearing, the Governor in Council may rescind the decision in question.[46] This check on the CRTC is both cumbersome and highly susceptible to cries from the public of unwarranted interference with free speech. No politically sensitive body will readily jump into this fray, especially if an "independent body" can be said to be in charge should the going get rough.

Both the private and public broadcasters have too much at stake in the *status quo* to be effective checks on the CRTC.[47] Until the recent two-stage hearings, the CBC and CTV networks were united in opposition to the introduction of pay-TV. Both felt that their respective positions and roles in the broadcasting system could be damaged by pay-TV competition. Neither displayed much inclination to look beyond their own particular area of concern or to seek out what the public might prefer. As the success story of pay-TV in the United States became more widely known, and as more Canadians became aware of the potential programme options that were denied to them, there appears to have been a realization by CTV and CBC that pay-TV is, indeed, "inevitable."

In a classic Canadian response, CBC and CTV found room to compromise their earlier differences and apply for a licence to programme pay-TV themselves. They excluded Global and all of the other major actors. Their motivation was more defensive and protective than innovative or directed towards any discerned public need. As a means of protecting their existing franchises, their use of a pay-TV licence would be merely a secondary marketing effort.[48]

The programme fare in the United States has been enriched by *new players* coming into the programme area via the pay-TV route. The old interests are becoming involved as well, but in new ways because of competition. The end result is an exciting menu of programmes and one that continues to improve and grow. In Canada we risk getting only more of the same because it is the same players who keep reappearing with ideas that are little changed over the years. Unlike the American market, the arbiter is not the public with its free choice, but rather it is the CRTC and the members of the *status quo* trying to build a system that responds at one level to the ideals of the broadcast policy and at another to the artificially limited forces of Canadian markets. Often the least important element in planning appears to be the viewer. His needs will only be met after the system is in place, not by the system being designed responsively to his requirements. The viewing public is not organized, yet it is not powerless. Its power rests with its ability to turn the television dial, and every day it registers its vote on how well it considers the CRTC to be executing its responsibilities. The availability and acceptance of so much foreign, especially American, television fare in Canada suggests that the viewing public does ultimately control the system. But whether this ultimate control can be efficient, or even effective, given the costs involved, remains very uncertain.

The other potential force, the provincial governments, has had to this point very little effect on the CRTC and the broadcasting system.

This may change with the coming of pay-TV and its related services, and with the maturing of the educational channel outlets in several provinces. Technological considerations may well be inextricably intertwined with the legal/jurisdictional issues. For example, it is possible that the provinces favour cable as the means of delivering pay-TV because with that system physically within their respective boundaries, their case for regulatory authority is at its strongest. At the other end of the technological spectrum, it is possible that the federal government might favour satellite transmission with its national orientation. This issue becomes even more complex when it is borne in mind that Telesat Canada is now part of TCTS which, in turn, is composed of members who are regulated in some instances by the CRTC and in others by the provinces.[49] A development in the United States, which may be here soon, exemplifies the complexity of the jurisdictional issue when technologies intermix. This concerns the introduction of view-data technology that has, for the first time, created direct competition in the market-place between AT&T and Time Life. Each will be a key participant offering videotex services.[50] How could this be regulated in Canada?

As the regulatory scene becomes ever more complicated, it *may* hasten an agreement between the federal and provincial governments over areas of responsibilities in the communications field. Alternatively, as these communications services become more localized and less in the nature of broadcasting, the provinces may win some jurisdiction through court action. Another scenario foretells that the technology will simply outpace the federal capacity to deal with the area exclusively.[51] However matters evolve, it appears certain that the provinces will assume key roles in regulating the new communications system. This localizing may, in the final analysis, prove to be a serious retardant to the growth of the system. The system's key feature is its ability to deliver special-interest programming inexpensively to those who want it no matter where they live. The erection of provincial regulatory boundaries may unduly inhibit the full extension of a new broadcasting system.

The relationship between the CRTC and the Minister of Communications, especially as it pertains to their respective responsibilities in the broadcast area, has been highlighted recently over the issue of pay-TV. Since 1970, various groups and industries that see their interests affected by pay-TV have submitted proposals to the CRTC. After holding public hearings and debating the various submissions, the CRTC decided in March 1978 that it would be premature to introduce a national pay-TV service at that time. The Commission's approach was predicated on the need for a national policy on pay-TV to precede its introduction in Canada.

Since then, many forces have moved the topic to the forefront in advance of any fully articulated, formal national policy. Basically the

CRTC was put in a position in which if it had not acted reasonably promptly, it would have lost any initiative to develop a national pay system. Already "illegal" satellite receivers bringing in American pay programmes, a local system in Saskatchewan, and other developments along the border had eroded the prospect of an exclusive pay system. This, along with increased pressure from the cable operators and programme producers, led to the announcement in November 1979 that a two-phased public hearing on pay-TV would be undertaken.[52] These hearings were announced jointly by the CRTC and the Minister of Communications. In the first phase, a committee to be appointed by the CRTC would canvass again the proposals from many of the same parties who had spoken out on pay-TV in the past. The second phase, following the report of the committee, would be a call for specific licence applications by the CRTC.

The two-phased hearing process was a bold response to the enormity of the issues at hand. It attempted to recognize the complexities that come with the question and the delicate, intermixed interests of the key participants, not the least of which is the Canadian public. The first hearing dealt with policy issues and broad directions for the whole broadcasting system. The seven-member committee was innovatively composed of three representatives from the provinces, three from the CRTC, and a chairman from the CRTC. The report of the Therrien Committee was released in July 1980[53] and generally favoured the introduction of pay-TV, subject, however, to many detailed recommendations. Most significantly, the report's major thrust was towards extension of basic television services to remote and ill-served areas. This emphasis resulted from the CRTC's continuing concern for this issue over the question of pay-TV. This emphasis indicated how independent the CRTC perceives itself to be. Notwithstanding the clear wish of the Minister of Communications to have the question of pay-TV addressed as a matter of highest priority, the CRTC concentrated instead on pushing the question of service to remote areas in Canada.

The minister had informed the CRTC, both in discussion and in writing,[54] of a series of objectives and guide-lines that represented a consensus of his views and those of his provincial counterparts. These positions had been developed through a series of federal-provincial conferences and follow-up working groups. These guide-lines and objectives, according to the minister, were offered "with a view to assisting the Commission in establishing the terms of reference. . . ."[55] The minister left open the prospect of revising with his provincial associates the objectives and guide-lines submitted on pay-TV and other related matters after the first hearing.

For its part, the CRTC established its sphere of authority very clearly and succinctly. Charles Dalfen, the acting chairman of the

CRTC, noting that there would be many sources of input besides the minister, wrote back acknowledging ". . . the benefit of the views expressed in [the minister's] letter, of the suggested objectives and guidelines prepared by the federal and provincial officials, which you were good enough to attach to your letter." To cap the relationship, Dalfen stated that a call for any possible licences would only be issued ". . . provided the *Commission* is satisfied that pay-television can make a significant and positive contribution to broadcasting in Canada and can make effective use of Canadian resources."[56] There can be little doubt that the CRTC acts independently. The place, then, where all the interested parties will seek to influence the outcome on pay-TV is at the CRTC hearings.

It is possible that a radical redefinition of our broadcast system for decades to come could result from the CRTC's decision on pay-TV. If it opens the system to the forces of fresh creative challenge, the public may be served by its fellow Canadians as it never has been in the past. The United States does not have a monopoly on creative talent. Their secret is simple. They try enough times so that eventually they succeed. In the United States, the producers and creators learn and progress from their failures. It is an essential ingredient in the system. The myth of the struggling artist who becomes an overnight sensation after twenty years in the business is the secret of the success the United States has enjoyed in the electronic arts. These people who stay within the system and learn it intimately eventually are the ones who have the experience to push it to even broader limits. The push is always there and ever so often a brilliant neophyte comes into the fracas and pushes too. They have room in the game for new brilliance. In Canada the price of failure is regarded as too high. We do not have the system in place that allows for significant creative practice. We do not tolerate, let alone encourage, failure as a step to creativity. Regulators are, after all, by their nature fearful of "destructive competition" and the creative chaos of the market-place.

Pay-TV may be unlike anything that has preceded for it brings the potential for practice and experiment. If we have 50 or 100 channels, then there will be stages and equipment to be used by imaginative Canadian producers and creators, Their craft will be honed by practice, by successes, and by failures. The fresh infusion of Canadian talent can bring a radical redefinition to our system. How do we nurture it? What can be the CRTC's role? It has tried to be creative with its most recent set of hearings, but there are severe institutional constraints on the creative ability of any regulator.

How Is the Question Decided?

What is the function of the CRTC hearing? It is at one level the meeting place of those parties interested in resolving an issue such as pay-TV. On a broader level, the hearing process is a means of informing and involving the general public so that the government will be both open and responsive to the people. It is basic, but essential to restate, that our democratic structure is itself a proxy to express and execute the will of Canadians. Our parliamentary system is the refined means that establishes the rules of the relationship between the people and their proxies. Whatever other rules apply, the one that supersedes and fashions all the rest is the requirement for openness. The complexity of the world we live in confronts us with the unnerving reality that for most, if not all, of the major questions of life there are no uniquely right answers. To reach successive plateaux of greater achievement we accept that a power to choose among alternatives must be exercised. We also accept that it is essentially a creative act — an endeavour to move us positively forward from the relatively known to the unknown. Yet this power is not a solitary function. It is a co-operative act, an open mutual undertaking of people.

Does the procedure adopted by the CRTC enhance the opportunity to develop creative choices? Is the procedure sufficiently open and supportive to allow the public viewpoint to run across and ventilate the critical issues that require resolution? The two-step hearing process was innovative because of the new participants in the phase-one hearing. The provincial representatives on the committee brought with them a new source of perspective. The rules, however, were essentially the same as they are for all of the CRTC major public hearings.

What is the CRTC trying to achieve with pay-TV? The answer requires a short step back to see how the CRTC regards its own mandate. In the *Special Report on Broadcasting in Canada, 1968–1978* published by the CRTC, there is a clear expression of how that body views its task.

> The Canadian broadcasting system is a national cultural resource dedicated by statute for the benefit of all Canadians, in all regions of Canada, to safeguard their identity and unity, to enrich their cultural understanding, and to strengthen the fabric of their country. If the system does not provide those programming benefits then it is *nothing*. If the programming of the system does not display the images, sounds, and accomplishments of Canadians, then Parliament's clear objectives and expectations have been negated.[57]

From the CRTC's own statistical analysis of the decade under review, which originated with its own mandate, the inescapable conclusion is that the objectives of Parliament as set out in the 1968 Broadcasting Act have, in fact, been "negated."

Undoubtedly, the CRTC has accomplished in the main the act's objectives with respect to the elimination of foreign ownership, extension of service to most Canadians, control over the cable television industry, and a lively, healthy AM and FM radio environment.

The critical failing comes in the area of Canadian programming on television. It is documented that between 1967 and 1977, the overall audience share for Canadian programming in prime time on all Canadian and American English-language television networks and stations was constant at only 29 per cent. To use the language of the CRTC *Special Report*, "the finding is striking" and leads to the conclusion that "U.S. programming clearly and decisively dominates."[58] The dimension of this failure is even clearer if we remove "news," "current affairs," "information," and "sports," which total 22 per cent of the Canadian programming viewed. The remaining 7 per cent of Canadian programming must also be placed in context, since the data indicate that Canadians primarily view television programming for its entertainment value — roughly 76 per cent of 6 P.M. to 12 P.M. prime-time viewing is entertainment fare. And it is here that American entertainment programming dominates. The Canadian public votes every day on the policy developed by the CRTC, and it has through the television ballot box seemingly "negated" Parliament's desire for a broadcast system "using predominantly Canadian creative and other resources." The count is 71 per cent against and 29 per cent in favour on the main question. The message is unmistakable. Why are the CRTC and the public so far apart? Is it because of the administrators, or the objectives, or both? Is it likely that in an era of rapid change, major government objectives will stay relevant over relatively long periods of time? Is the Broadcasting Act still relevant?

The CRTC's rules of procedure, although on the surface open and progressive, have failed to help the CRTC achieve the end result it has aimed for in accordance with its mandate. Just as our courts have found that the rules of natural justice are a convenient way to become involved if they want to, the CRTC has discovered that "informality" keeps the courts somewhat at bay, and also keeps the public effectively away from the serious issues. Anyone who wants to appear at a CRTC hearing can do so if the CRTC allows them an oral presentation. But the procedural rules really only allow the public to "blow off steam." Until the courts become involved, the CRTC is even reluctant to allow interveners access to financial statements in cable rate-increase hearings although this was the evidence upon which any decision had to be based. This is how a façade of "informality" may be used to block effective participation.

Does this exemplify a lack of interest by the CRTC in effective public involvement? Consider, as well, whether the persistent refusal to allow competitive applications at licence renewals and transfers may show a lack of interest in having effective participation other than from the established "members of the club." There can be little doubt that the CRTC has the legal power to bring the system at least somewhat closer to the broadcasting policy than it now is. Yet, for reasons that are not yet totally evident, ". . . the CRTC has permitted the system to perform well below its potential [such that] the policy question becomes how the Commission can be induced to responsibly exercise [its] powers to the advantage of the performance of the system without overstepping the bounds of reasonableness."[59]

Despite its independence in law and practice, the CRTC has not established effective co-operative arrangements with the rest of government. "In practice," it has been observed, agencies such as the CRTC "have not found strength through independence, but merely weakness in isolation."[60] With its often outdated and ineffective procedural approach, there is likewise very little relationship with the public. Thus, the agency charged with regulating our major national communications system has isolated itself, both at the top and at the bottom. It has no one to relate to except those parties who seek to benefit from its licensing power. The dialogue on important communications issues has become, over the years, insular and repetitious. The only interest has become the people themselves and their particular personalities. Little attention appears to be paid to what the participants say, by anyone. Those in the know seem to recognize that the process may be more charade than substance.[61]

It would appear that the CRTC accepts its role because it has neither a popular, as opposed to a legislative, mandate to Canadianize the system's content nor adequate funds or manpower to really do the job. The CRTC cannot itself change the Broadcasting Act. It could, however, take measures to improve its own procedures. Over three years ago the Commission announced proposals for new procedures and practices relating to broadcasting matters. Central to these proposals were provisions for far greater access to financial information on private broadcasters.[62] This would have made it possible for concerned interveners to identify resources available to improve programme variety and quality. It would have made interventions at licence renewal time far more effective and not an empty ritual. Rather than being met with stonewalling along "We just can't afford that" lines, it might at last have been possible to move from bombast to bottom line. At the public hearings on the proposed procedures, the private broadcasters were outraged and the voice of public interest interveners was swamped. Nothing has been done to revise the procedures along the lines proposed in July 1978. *Requiem in pace*.

There are, unhappily, many parallels to the series of pay-TV hearings that have brought so little positive result. The cost to the industry and to the public of money and time on these endless series of public hearings must be related to results to be justifiable. Is it really sufficient only that the hearings take place? Is there not a duty on regulators to make effective use of their powers? A serious regulatory issue that has surfaced through the hearings on pay-TV (and at many other CRTC hearings) is a deficiency in the process — in the CRTC procedures for public hearings.

If we could borrow the cynic's cloak, it might be said that the CRTC recognized very early from its enabling act and the experience of its predecessors that it could not really accomplish the objectives assigned to it. Its mandate was "soft" in a "hard" area and it could make the whole thing soft if it were informal and casual in its approach. By forming a friendly club that now and again called in outsiders for a brief visit, there would be little direct confrontation about what it was supposed to be doing and why it was not being successful. And if it quietly and in piecemeal fashion let the public have what it wanted, that is, American programming at the expense of its legislative mandate, then "informality" could take care of the few noisy dissenters. In those few instances where the issues have been "hard" and public concern has been mobilized, as in the *London Cable Case*, the courts will intrude with the rules of natural justice.[63] Other than the applicants who are sufficiently protected with their own arsenal of resources, who else has an "interest" that the CRTC is directly affecting? By letting anyone in and creating the ground rules around this mass participation premise, the CRTC has minimized the rights of any one person or group that might have a special interest at stake.

The CRTC regards its main functions as essentially "administrative" in nature. For this reason, ". . . it has been reluctant to 'judicialize' broadcasting by permitting cross-examination, financial disclosure, competitive licensing and full reporting of reasons for decisions."[64] With this wide open approach few serious interventions can take place. It is as if David in his intervention with Goliath were to be asked to give up his sling-shot in the interests of informality! An outside party to a hearing, even in the pay-TV hearings, has no means at his disposal to pursue a line of thought or attack with any vigour. The intervener can speak to the Commission, but cannot challenge the Commission or, more importantly in licence hearings, cannot reach the applicant or confront him directly. Notwithstanding the volumes of recorded discussion that come from a CRTC hearing, an outside observer quickly notices that no one is talking directly to anyone. And what is even more discouraging is the obvious fact that hardly anyone is listening to what is said, unless it is the chairman speaking or some well-known broadcast personality.

The CRTC is going to have to be dispassionately honest with itself. Can there be more significant public participation than the everyday response to the system through viewer choice? If there is truly a need for additional public input that would be useful to the CRTC, why have sophisticated research tools not been employed? Industry has put these means to good use in order to have the public's input and contribution to their objectives. If there is some worthwhile purpose in having significant public participation in the decision process, there are still several open questions that need answers before progress can be achieved. Which public should be encouraged to participate? How can their efforts be subsidized where it is found to be necessary and useful to have their involvement? What rules will make the hearings productive? How can the process be monitored and revitalized so that it remains responsive to assisting in the achievement of the CRTC's goals? How may the views of other branches of government be best brought into the process? What skills are required of the CRTC personnel to enliven the process? Do we really need more than the dial to turn the system to the needs and service of the public?

Some Unresolved Legal Issues

A number of very different means of implementation have been proposed for pay-TV and, at the date of writing, this fundamental issue remains quite unsettled. They have ranged from the idea of one government-owned network to a virtually unlimited (but licensed) number of operators and exhibitors, with several alternatives in between. Whatever approach is eventually agreed to, there are two critical, preliminary legal questions that will have to be resolved before any system can be instituted.

Towering over all of the other legal issues, and, indeed, over most of the policy and social issues, is one momentous, basic question. Should the government be allowed to determine what the people of Canada will be able to view in the privacy of their own homes, particularly where the viewing selection is paid for consciously and directly by the viewer?[65] The government does not decide our choice of books, magazines, films, videocassettes, and videodiscs or any other media of communication that the consumer can obtain through direct purchase, subject only to the general laws of the land with respect to pornography and the like.[66] From a legal perspective, is pay-TV any different? If it is, or if it could be mandated to appear to be different, should it be? As Switzer has succinctly pointed out, pay-TV is, when all is said and done, our neighbourhood theatre screen brought into our homes without the disadvantage of stepping on some stranger's spilled pop and popcorn.[67]

When a fully matured, two-way communications system is in place, there will be available to the consumer many services similar to, or at least equivalent to, books, magazines, videocassette, and videodisc-type programming and the like. Given this broad mix of products, some of which will be "free," most of which will be paid for, will the CRTC be able to regulate everything that goes into this two-way system? Should it be allowed to have this type of control? It is now widely agreed that the government has no place in the bedrooms of the nation. Does it have any place in the family rooms of the viewing public? Is the issue still one of Canadian content or should we be concerned with freedom of access, *both* by the supplier of programming and by the purchaser? Is there not a point at which the value of supporting the concept of Canadian content has to give way before what are, in essence, *private* transactions?

An all too often overlooked aspect of the broadcasting policy speaks to the promise of pay-TV. It provides that while licensees have a responsibility for the programmes they broadcast, " . . . the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned."[68] It appears that the technological pendulum has now swung in favour of this "unquestioned" right. Where, then, could the CRTC derive its authority to "supervise and regulate" pay-TV? If it is to be found anywhere, it must be within the Broadcasting Act. Failing specific mention of pay-TV in the act, it must be derived in some indirect manner. The powers held by the CRTC are set forth in section 16. These powers are limited by the objects that are stated in section 15 and must be exercised for the purpose of implementing the broadcasting policy in section 3 of the act.

A careful reading of the broadcasting policy leads to the conclusion that the CRTC's authority over "broadcast receiving undertakings" (cable operators) is tenuous and, at best, is derived from the use of over-the-air rediffusion or relay of signals.[69] Even the definition of "radio communication" omits the inclusion of cable by prescribing that the transmission is to be "without artificial guide." Accepting, for the moment, that the CRTC does have the power to enact regulations respecting cable, its scope of activity would appear to be limited to the reception aspects of television signals as this is the whole thrust and purpose of the broadcasting policy in section 3. The policy only makes reference to broadcasting undertakings, and by definition thus only relates to over-the-air signals.

Does the CRTC, then, have any legal authority over the non-broadcasting services of the cable licensees or of anyone who could provide such services? If a private business person is in direct competition with a cable licensee to provide home burglar and/or fire protection services of a similar nature, does the CRTC thereby gain the authority to regulate the activities of that private businessman? Obviously it does not. What then is the basis for the linkage between the regulation of a cable licensee in accordance with the terms of its licence in respect of its over-the-air relays, and other services that are not within the ostensible confines of the broadcasting policy?

The question that then follows is whether pay-TV is "broadcasting." The essence of that argument is whether the signal transmission is intended "for direct reception by the general public." Unlike free television (over the air), pay-TV requires that the television viewer contract with the authorized sender of the signal to be able to receive that signal. We have in pay-TV a private contract for services between consenting parties (see how close we are again to the uninhibited bedroom!). Public policy should be concerned with this relationship only through the application of the general law of the land.

It may be argued that because transmission is intended for anyone who can contract and pay for the service, it is therefore "intended" for "direct reception by the general public." Is the person who cannot pay for pay-TV service, and thus excluded from it, the same, in principle, as the person who does not own a television set and thereby does not receive "free" television as part of the "general public"? Free television is for everyone with a television set because it uses a public property, the air waves. But it is inherent to pay-TV that exclusions from the "general public" are intended. A pay-TV operator will not "intend" his programme on ballet and opera to be for the "general public." If he did so intend, he would be a broadcaster. The essence of pay-TV is that it is not "intended" for the general public. It is intended for a very specialized public — the sports buff, the arts lover, the movie addict, who will pay for the service. Thus mere availability of a signal and actual use of that signal are two different concepts. The factor that separates them into broadcasting or non-broadcasting must be the intention of the sender.

The other major legal issue is whether the CRTC has the authority under the Broadcasting Act to license a pay-TV "network," even if it can control individual cable licensees with respect to pay-TV. Part of the issue here too is the nature of a pay-TV transmission. Even if it is deemed, and eventually determined in court, to be "broadcasting," this still leaves open the question of what constitutes a pay-TV "network." The definition of "network" in the act requires, among other things, that "control over all or any part" of the programme be delegated to "a network operator."[70] How could this be effected in a fully operational pay-TV system? On what basis would the CRTC guide the "network operator"? Is a pay-TV network sufficiently "ancillary" to the function of licensing cable operators that the CRTC would have the requisite authority? If it is not, then the type of pay-TV system the CRTC could authorize would be very different from that envisioned by most interested participants and observers.

These major legal issues that will arise with the advent of pay-TV may well have profound effects in Canada and cannot be dealt with in technical isolation, no matter how splendid. The implications of their resolution reach well beyond what we now know as broadcasting and touch the very nerve centre of our society as it moves into a new era. The Age of Broadcasting has paved the way for the Information Era. The transition, although evolutionary, still demands some significant adjustments. What happens to the Old Guard — the Broadcasting Act, the CRTC, and today's broadcasters? Who will decide whether they have a predominant role to play and whether their old functions will be updated?

If the courts are called on to assist, and they determine that pay-TV is subject to the Broadcasting Act, then the same players will be around, probably to bring us the same product, except in a new box and at a higher price. Should the courts determine that pay-TV is a "non-broadcast" function outside the Broadcasting Act, then the game will presumably be enlarged and new players will come in with new, innovative ideas. In short, it must be recognized that the legal issues are more, in truth, major public policy questions in disguise. If this is so, would it be appropriate to ask the courts to arbitrate these issues should they look at them only through the narrow prism of law?

Conclusion

As we have seen, efforts to deal with pay-TV by way of a regulatory scheme established in response to earlier issues in broadcasting amount to an unthinking resolve that square pegs simply have to go into round holes because all have something to do with "broadcasting." Pay-TV is different. Unlike traditional broadcasting, it is in its essence a private relationship between a subscriber and a provider of a service and not one infused with public interest concerns for the allocation of scarce spectrum resources. Unlike traditional broadcasting, which is by its nature a means of mass, general communication, pay-TV, especially in its highest pay-per-programme form, is by its nature a means of individualized, specialized communication.

What is called for by pay-TV is a mechanism that will maximize individual choice so that new sub-markets can be discovered by new and adventurous programmers. Consider the blossoming of cultural networks in Newton Minnow's "vast wasteland."

> During the past several months on Bravo, a new cable-television network, Leonard Bernstein conducted the American Symphony Orchestra in a tribute to Aaron Copland, a group of jazzmen celebrated Eubie Blake and the Indiana University Opera Theatre performed the "The Greek Passion". On ABC's Arts, a second cable network, the schedule last month included a ballet choreographed by George Balanchine, profiles of Jean Renoir, Edgar Degas and Henri Toulouse-Lautrec and the St. Louis Ragtime Band performing a selection of Scott Joplin songs. On CBS Cable, which will make its debut in October, the schedule includes the premiere of a dance

> choreographed by Twyla Tharp, a one-woman show featuring Jane Alexander and twelve hours devoted to a drama about the life of Guiseppe Verdi.
>
> It sounds like a video version of the Renaissance. Indeed, in the most optimistic scenarios for the future, this flowering of the arts will be just one part of cable TV's brave new world. New cable systems promise up to 100 channels, and already networks aimed at specific interests — movies, sports and news, for example — are springing up. But many more channels will have to be filled, and that raises the possibility of even more specialized networks — ones devoted to narrow interests such as tennis and knitting, or even networks that feature a single art form — modern dance or theater, for example.[71]

This type of exciting innovation will not long survive the "dead hand of regulation" with its inherent fear of the creative chaos of the market-place, instinctive defence of established interests, and propensity to favour mandated selection over individual choice.[72] No doubt a form of pay-TV can be set in place through regulation, but it will fall far short of pay-TV's potential.

Notes

[1] See, for example, C.C. Johnston, *The Canadian Radio-television and Telecommunications Commission*, study prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1980), and R. Brian Woodrow *et al.*, *Conflict Over Communications Policy: A Study of Federal-Provincial Relations and Public Policy* (Montreal: C.D. Howe Institute, 1980). See, as well, Stuart McFadyen, Colin Hoskins, and David Gillen, *Canadian Broadcasting: Market Structure and Economic Performance* (Montreal: The Institute for Research on Public Policy, 1980), and Robert Babe, *Canadian Television Broadcasting Structure: Performance and Regulation* (Ottawa: Minister of Supply and Services Canada, 1979).

[2] As Oscar Ganley has noted, this difference in approach to pay-TV is symptomatic of broader national distinctions. Canada regards ". . . the swift changes taking place . . . [in communications] as primarily political events"; for the United States they are "largely [seen] as technical and commercial problems." *The United States-Canadian Information Resources Relationship* (Cambridge, Mass.: Harvard Center for Information Policy Research, 1980), p. 4.

For a forceful articulation of a uniquely Canadian "Public Broadcasting Culture," see Herschel Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J.J. Douglas, 1974), pp. 254–97. As he sees it, ". . . the American doctrine (the market tyranny) has paradoxically crushed individualism in the name of individualism while public broadcasting in Canada has, also paradoxically, encouraged individualism in the name of the collectivity." *Ibid.*, p. 289.

[3] Canadian Radio-television and Telecommunications Commission, Committee on Extension of Service to Northern and Remote Communities, *The 1980s: A Decade of Diversity: Broadcasting, Satellites, and Pay-TV* (Ottawa: Minister of Supply and Services Canada, 1980), p. 59 (hereinafter referred to as the *Therrien Report* after its chairman, Réal Therrien).

[4] For the rich history of Canadian broadcasting, see Frank W. Peers, *The Politics of Canadian Broadcasting, 1920–1951* (Toronto: University of Toronto Press, 1969) and *The Public Eye: Television and the Politics of Canadian Broadcasting, 1952–1968* (Toronto: University of Toronto Press, 1968); E Austin Weir, *The Struggle for National*

Broadcasting in Canada (Toronto: McClelland and Stewart, 1965); and David Ellis, *Evolution of the Canadian Broadcasting System: Objectives and Realities, 1928–1968*, study prepared for the Department of Communications (Ottawa: Minister of Supply and Services Canada, 1979).

[5] See the Broadcasting Act, R.S.C. 1970, c. B–11, especially section 3. Contrast this with Lord Annan's observation: "The broadcasting audience does not need education or even literacy to understand and enjoy programmes; and for good or evil this is potentially one of broadcasting's greatest assets." Report of the *Committee on the Future of Broadcasting* (London: H.M.S.O., 1977), p. 25.

For popular concerns about the implications of the CRTC's approach, see, for example, B. Blackburn, "The Spectre of Big Brother Looms When a Professor Controls Your Viewing Choice," *Star Week Magazine* (14 February 1981); J. Miller, "CRTC Boss Calls for Tax on US TV Show Imports," *Toronto Star* (11 April 1981). And see the editorial, "The Aging of Pay-TV" in the *Globe and Mail* (1 August 1980), p. 6.

[6] See, for example, M. Christopher, "Nielsen Study Shows Cable Gaining on Nets," *Advertising Age* 51 (27 October 1980), p. 3. For a useful overview of the growth of cable and pay-TV in the United States, see a series of articles in the Sunday *New York Times* Arts and Leisure Sections, "The Cable-TV Revolution: How It Affects the Arts," (5 July 1981); "Reviews of Major Cable Services Available in the Tristate Area," (12 July 1981), s. 2, p. 25. For rapid developments in the United States, see "Cable News Network — In Search of an Identity," *New York Times* (29 June 1980), s. 2, p. 27; "In Scramble to Bring Cable TV to Your Area," *U.S. News & World Report* (6 October 1980), pp. 47–48; "Cable TV: The Race to Plug In," *Business Week* (8 December 1980), pp. 62–64; and Martin Mehr, "Cable TV Full of Promise — Once Arguing Is Over," *Financial Post* (10 January 1981), p. 11.

[7] This has been recognized in Canada in the CRTC's *Pay Television Background Research Paper: Pay Per Program Television* (Ottawa: Minister of Supply and Services Canada, 1978), p. 9. "For a multiplicity of reasons, most individuals who think about pay television for any length of time come to the conclusion that the best approach is 'pay-per-program'. Other forms of pay television (subscription and universal) are compromises until the technology and economics permit pay-per-program to arrive."

[8] Consider I. Switzer, "It's the Beginning of the End of Broadcast Rules," *Marketing* 85 (27 October 1980), p. 3.

[9] CRTC public statements have shown little real analysis of the issue. For instance, Chairman John Meisel has simply observed, "It's inevitable that we will have it" without indicating exactly what "it" is that is "inevitable." "The Chairman Set to Shake up the CRTC," *Globe and Mail* (9 October 1980), p. 14. Interestingly, the CRTC chairman cited as his reasons the popularity of pay-TV in the United States and ". . . the various interests that want to bring about Pay-TV are influencing public opinion in the country. They are also influencing the opinion of the decision-makers."

[10] This view was forcefully expressed in Tel-Pro Entertainments, "Presentation to the CRTC Regarding Pay Television in Canada," September 1976.

[11] Consider, for example, Hal Hellman, *Communications in the World of the Future* (New York: M. Evans & Co., 1975). For a Canadian perspective, see David Godfrey and Douglas Parkhill, *Gutenberg Two: The New Electronics and Social Change* (Toronto: Press Porcépic, 1979), and Department of Communications, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, *Telecommunications and Canada* (Ottawa: Minister of Supply and Services Canada, 1979).

[12] See M. Van Loucks, "The Future of Cable TV: There's Gold in Them Thar Wires," *Direct Marketing Magazine* (March 1980), p. 60.

[13] Consider the view of Mike Dann, a respected cable TV consultant: ". . . the day where we'll be paying $500 a month for the electronic services that come into the home isn't very far off — it's four or five years away." "The Cable-TV Revolution: How it Affects the Arts," *New York Times* (5 July 1981), s. 2, p. 21.

[14] As Hellman has put it, "We now have four 'pipes' coming into our homes: water, gas, electricity and telephone. Perhaps we will one day have a fifth — an information pipe." Hellman, *Communications in the World of the Future*, p. 178. Or as others have observed, "All information in all places at all times. The impossible ideal. But the marriage of computers with existing communications links will take us far closer to that goal than we have ever been." Godfrey and Parkhill, *Gutenberg Two*, p. 1.

[15] Consider the thrust of *Cable, Report to the President* (Clay Whitehead, Chairman) (Washington: Library of Congress, 1974), as set out at p. 4 ."The goal of this policy is to assure the development of cable as a communications medium open to all, free of both excessive concentrations of private power and undue government control."

[16] Discussed in the *Therrien Report*, p. 55.

[17] For clear evidence of this grass-roots resistance to regulatory ambitions, see the CRTC's *Special Report on Broadcasting 1968–1978* (Ottawa: Minister of Supply and Services Canada, 1979) (hereinafter *Special Report*).

For an enthusiastic current reassertion of the centrality of cultural values, see the Federal Cultural Policy Review Committee, *Speaking of Our Culture: Discussion Guide* (Ottawa: Minister of Supply and Services Canada, 1981).

[18] As so elegantly demonstrated by Harold Innis in *The Bias of Communication* (Toronto: University of Toronto Press, 1951).

[19] As Babe has noted, the CRTC has been markedly prone to maternal protectiveness. "The absence of (performance related) rewards is the major failing of regulation today. . . . It is the primary contention of this study that the CRTC has been too preoccupied with the financial condition of its licensees' performance." Babe, *Canadian Television Broadcasting Structure*, pp. 226 and 231.

[20] See K. Valaskakis, *The Information Society: The Issues and the Choices*, Integrating Report, Phase I, Gamma Information Society Project (Ottawa: Department of Communications, 1979), p. 99.

[21] For these developments see M. Christopher, "Cable Panel Mulls Growth," *Advertising Age* 51 (11 August 1980), p. 78.

[22] As clearly demonstrated in the CRTC's own evaluation: see *Special Report*.

[23] R.S.C. 1970, c. B–11.

[24] R.S.C. 1970, c. R–1.

[25] S.C. 1974–75, c. 49 (Proclaimed in force 1 April 1976).

[26] "In short, the major raison d'être of the CRTC is Canadian content." Babe, *Canadian Television Broadcasting Structure*, p. 7.

[27] John Meisel, Chairman of the CRTC, has observed: "It is my impression that the broadcasting and communications industries in Canada are among the best organized interest groups, and, let's admit it, lobbyists in the country." "Notes for an Address to the Canadian Broadcasting League," Ottawa, 6 October 1980, p. 7.

[28] Highlights of the various provincial approaches can be seen in the *Therrien Report*.

[29] Consider, for example, the contrast between the "means" approach of the Therrien Committee as outlined at the outset of this paper and the "ends" as viewed by Ontario. "To ensure incentives exist to encourage diverse and specialized programming, pay television should be designed to permit the consumer to watch what he wants to watch, when he wants to watch it, at a price he is prepared to pay." Ontario, Minister of Transportation and Communications, "Submission to the CRTC Committee on Extension of Service," 3 March 1980, p. 19.

[30] Thus John Meisel would wish to see Canadian broadcasting foster his vision of a caring, sensitive Canadian society. American programming is considered "fundamentally unsatisfying" because ". . . so much that is real, important, human and true has been taken out." As he went on to state: ". . . if, through its sins of commission,

television programming makes the viewer feel like a fool and a failure, by its sins of omission, it leaves its victims unenlightened about the substance and joys and problems of living in the real world. It pays scant attention to values that confer grace and dignity upon a society: respect for the individual, sincerity in human relations, confidence in our friends, and concern for our neighbors." "Notes for an Address to the Canadian Association of Broadcasters," Quebec, 6 April 1981, pp. 3 and 9.

[31] As the *Special Report* concludes in its detailed analysis of viewing preference during the first decade of CRTC regulation, 1968–1978, ". . . in spite of the fact that over the decade significant new Canadian stations . . . became operative and CTV service was extended . . . the audience share of US signals has *decidedly* increased" (p. 97, emphasis added).

[32] For a recent example, consider the hawkish talk of the Minister of Communications, Francis Fox, with his references to "self-defence against foreign invading cultures." "Notes for an Address to the Canadian Conference of the Arts," Ottawa, 7 May 1981, p. 4. Consider as well the ambitions of the Federal Cultural Policy Review Committee as indicated in its *Discussion Guide*.

[33] Canwest Ltd. at page 10 of its "Submission on the Extension of Service" to the Therrien Committee well captured the price to be paid for too high ambitions for Canadian programming. "By forcing Canadian broadcasters to stretch their resources too thin, the regulatory authority has inadvertently helped to create a generation of Canadians who believe 'Canadian' means 'not quite as good' in many types of television programming."

[34] For details on the Ontario position, for example, see "Statement by the Honourable James Snow, Minister of Transportation and Communications, Ontario, Regarding Constitutional Discussions/Cable Delegation," Fifth Federal-Provincial Conference of Communications Ministers, Toronto, 16–17 October 1979. Doc No 830–54/011.

[35] Van Loucks, "The Future of Cable TV," suggests that today's communications industry could virtually double over the next five years through the development of new sources.

[36] See, for example, Ontario's position, above note 34 at p. 4.

[37] This is the common theme that runs throughout the history of Canadian broadcasting. See, particularly, Peers, *The Politics of Canadian Broadcasting*, and *The Public Eye*; and Ellis, *Evolution of the Canadian Broadcasting System*.

[38] In a "one wire" world of the future, especially if that one "wire" is optical fibre, the eventual winner may well be the telephone companies. See Godfrey and Parkhill, *Gutenberg Two*.

[39] For an excellent account of the role of advertising in "free" television, see Eric Barnouw, *Tube of Plenty: The Evolution of American Television* (New York: Oxford University Press, 1975).

[40] The CTV was successful in the Federal Court of Appeal although only on a relatively narrow point. However, leave to appeal has been granted to the Supreme Court of Canada on the whole range of issues originally raised and these touch on many aspects of the CRTC's practice and procedure in broadcast regulation. This case will be argued in the fall of 1981 in the Supreme Court of Canada, as will an appeal by the Canadian Broadcasting League in the Federal Court of Appeal with respect to a right to cross-examination in an intervention against the acquisition by Rogers Telecommunications of West Coast cable companies. As well, the issue of what is involved in a licence "in principle" will be before the Federal Court of Appeal in an appeal by Ralph Jacobson from a CRTC decision on religious broadcasting.

[41] S.C. 1974–75, c. 49.

[42] Broadcasting Act, R.S.C. 1970, c. B–11, s. 15.

[43] For an excellent review of the powers of the CRTC, see Johnston, *The Canadian Radio-television and Telecommunications Commission*.

[44] See Babe, *Canadian Television Broadcasting Structure*, pp. 49–100. See also Ellis, *Evolution of the Canadian Broadcasting System*.

[45] Broadcasting Act, R.S.C. 1970, c. B–11, s. 22.

[46] *Ibid.*, s. 23.

[47] Both cable operators and broadcast licensees have, according to a recent study, received "supranormal" rates of return on their licences. Robert E. Babe and Philip Slayton, "Competitive Procedures for Broadcasting — Renewal and Transfers," study prepared for the Department of Communications (Ottawa, 1980), p. iii.

[48] See Blaik Kirby, "Networks Join to Fight Cable Over Pay-TV," *Globe and Mail* (13 March 1980), p. 1.

[49] The CRTC has recently grappled with this issue. See Telecom Decision CRTC 81–13, *Bell Canada, British Columbia Telephone Company and Telesat Canada: Increases and Decreases in Rates for Services and Facilities Furnished on a Canada Wide Basis by Members of the Trans Canada Telephone System, and Related Matters*, 7 July 1981.

[50] "Window on the World: The Home Information Revolution," *Business Week* (29 June 1981), pp. 74–83.

[51] For a particularly useful review of these issues, see Roy Shields, "Can the Networks Survive Pay-TV?" *Canadian Business* 53 (June 1980), pp. 74–81.

[52] "Macdonald and CRTC Announce Two-Phased Public Hearing," CRTC Press Release, Ottawa, 29 November 1979.

[53] *Therrien Report*.

[54] Letter of the Minister of Communications, David MacDonald to Charles Dalfen, Acting Chairman, CRTC, 22 November 1979.

[55] *Ibid.*, p. 3.

[56] Letter of Charles Dalfen, Acting Chairman, CRTC, to David MacDonald, Minister of Communications, 26 November 1979.

[57] *Special Report*, p. 95 (emphasis added).

[58] *Ibid.*, pp. 99–100.

[59] Babe and Slayton, "Competitive Procedures for Broadcasting," p. VI-8.

[60] H.N. Janisch, "The Role of the Independent Regulatory Agency in Canada," *University of New Brunswick Law Journal* 27 (1978), p. 104.

[61] For a hard-hitting assessment of the effectiveness of the CRTC, see Maggie Siggins, *Bassett* (Toronto: James Lorimer, 1979) pp. 189–239. Consider as well Robert Babe's detailed criticisms: *Canadian Television Broadcasting Structure*, and (with Slayton) *Competitive Procedures for Broadcasting*. And see three columns by Geoffrey Stevens in the *Globe and Mail*: "A Peculiar People," (6 January 1981), p. 6; "Three Options," (7 January 1981), p. 6; and "On Its Merry Way," (8 January 1981), p. 6. Contrast the diffident approach of the CRTC with developments in Britain — "Southern and Westward TV Lose Franchises and Others to Be Restructured," *The Times* (29 December 1980), p. 1 and "The Great Franchise Flutter," *The Times* (29 December 1980), p. 11.

For sombre assessments of the ability of the CRTC to cope with its mandate, see, for example, Blaik Kirby, "Is the CRTC Near Collapse?" *Globe and Mail* (2 April 1980), p. 7; Editorial, "Poor Stuff But Not Our Own," *Globe and Mail* (9 July 1980), p. 6; and Ian Anderson, "Profile. John Meisel: Both Hands on the Dials of Canadian Culture," *Maclean's* (29 December 1980), pp. 7–9.

[62] CRTC Public Announcement, "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters," Ottawa, 25 July 1978, pp. 14–19.

[63] *Re Canadian Radio-Television Commission and London Cable TV Ltd.*, (1976), 67 D.L.R. (3d) 267 (FCA).

[64] Babe and Slayton, "Competitive Procedures for Broadcasting," p. II-16.

[65] See Shields, "Can the Networks Survive Pay-TV?" "As for the people having the freedom to watch what they want, Meisel says they should also have the right to watch Canadian programs," p. 81.

[66] For the potential impact of videodisc on the future development of television, see R. Gallop, "Videodisc: It Could Replacce the Phonograph," *Marketing* 85 (15 September 1980), p. 33.

[67] I. Switzer, "Submission to Committee on Extension of Service," (11 April 1980), p. 7.

[68] Broadcasting Act, R.S.C. 1970, c. B – 11, s. 3(c).

[69] For recent judicial determinations of the CRTC's powers with respect to cable, see *Capital Cities Communication Inc.* v. *Canadian Radio Television Commission*, [1978] 2 S.C.R. 141 and *Public Services Board* v. *Dionne*, [1978] 2 S.C.R. 191.

[70] Broadcasting Act, R.S.C. 1970, c. B – 11, s. 2.

[71] Tony Schwartz, "Opportunities Knock for Performers and Producers," in "The Cable-TV Revolution: How It Affects the Arts," *New York Times* (5 July 1981), s. 2, p. 1.

[72] The phrase is borrowed from James Q. Wilson, "The Dead Hand of Regulation," *The Public Interest* 25 (Fall 1971), p. 39.

Economic Aspects of the Operation of Pay-TV in Canada

5

by
Steven Globerman

Introduction

The public debate concerning when and how to introduce pay-TV in Canada centres, in part, on a number of economic issues. These issues are presumed to be important in evaluating the net social benefits of introducing pay-TV. They include the expected demand for pay-TV, the anticipated revenues to cable operators, the impact of pay-TV on private broadcasters and on the CBC, pay-TV's implications for the production of films and other programming, and the possible use of pay-TV revenue to subsidize other cultural activities.

The purpose of this essay is to place these economic issues in a broader perspective, specifically that of welfare economics. The term "welfare economics" identifies that branch of economics concerned with studying policy issues related to the allocation of resources. Welfare economics provides a useful framework in which to structure and analyse public policy issues, notwithstanding the fact that it seldom provides a clear-cut solution to specific issues in public policy. For our immediate purposes, this approach allows us to address some specific arguments raised to date apropos pay-TV as well as to identify some considerations hitherto largely ignored. Relevant available evidence is brought to bear upon a number of substantive empirical questions raised by our analysis; however, the evidence and the conceptual framework put forth are suggestive rather than conclusive.

The various economic arguments that have been raised apropos the introduction of pay-TV in Canada are by and large *ad hoc* in nature. In the absence of an integrated welfare framework, it is difficult to know which arguments are relevant, let alone which constitute persuasive evidence in favour or against further delaying the introduction of pay-TV. In this regard, there are three broad criteria that are ordinarily invoked by economists to evaluate public policy issues: equality in the distribution of income, allocative efficiency, and fairness.

The essay proceeds as follows. The next three sections deal separately with each of the three criteria proposed as a welfare framework for evaluating the introduction of pay-TV in Canada. A further section considers several additional arguments, and the concluding section considers some public policy implications of our analysis.

The Distribution of Income and Pay-TV

Distributional considerations complicate economic welfare analysis in several ways. Strictly speaking, even if a policy is implemented that results in an unambiguous increase in total (i.e., economy-wide) output and leaves everyone better off, or at least no worse off than they were before, the improvement in social welfare is unambiguous only for the distribution of income extant when the policy was implemented. Therefore, if one allows value judgements about the distribution of income to enter the analysis, it is possible that a policy change which increased everyone's income would fail to represent an unambiguous improvement in social welfare because the distribution of wealth extant prior to the change was socially unacceptable.[1]

Economists have recognized that the aforementioned analytical constraint, if strictly applied, would render policy analysis largely irrelevant, since identification of unambiguous improvements in allocative efficiency would be virtually impossible. It has also been recognized that policy initiatives taken in strict ignorance of their allocative impacts may be quite damaging to the social interest. Thus, the strict criteria for defining improvements in social welfare are generally relaxed to facilitate comparisons among what has been labelled "lower-level" optimal conditions.[2] More specifically, allocative and distributive considerations are treated as being weakly separable, in that one does not ordinarily test whether the requisite payment needed to compensate individuals made worse off by any given policy is sensitive to the initial distribution of wealth prior to the policy. That is, the policy analyst ordinarily takes the existing distribution of income as a given and evaluates whether a proposed policy will make this distribution more or less equal. Given an egalitarian ethic, policies that effect a redistribution of income from high- to low-income groups will be considered to improve social welfare, other things being constant.

The introduction of pay-TV might therefore be considered a welfare-improving public policy if it made a substantive contribution towards improving the distribution of income, holding allocative considerations constant.[3] Evaluating the distributive effects of any specific policy is ordinarily complicated by the fact that its incidence (i.e., the distribution of benefits and costs) is difficult to identify. In the case of introducing pay-TV, the potential beneficiaries and losers will, in part, depend upon how the introduction is effected. For example, if pay-TV is introduced through existing cable operators, the shareholders of Canadian cable companies might be expected to realize a substantial wealth gain; however, this gain might be mitigated if cable companies were required to undertake (or finance) the production of original Canadian entertainment material. Besides the way in which pay-TV is introduced, the precise distribution of benefits and costs would depend upon supply and demand conditions in relevant factor and output markets. The distribution of benefits and costs from pay-TV's introduction will depend on a number of factors including viewer costs and methods of charging, programming diversity and quality, the distribution of revenues, and the viewing tastes of different segments of the Canadian viewing population.

Given the lack of adequate data on many of these important issues, we can only speculate on the likely incidence of pay-TV's benefits and costs across different income groups. In this regard, several relevant observations might be made. One is that movie attendance and attendance at live performing arts events tend to be concentrated among individuals with above-average incomes and above-average education levels.[4] To the extent that pay-TV programming emphasized provision of specialized cinema and performing arts events, and to the further extent that viewer payment for such programming was not strictly on a per-programme basis, net benefits could be concentrated largely among above-average socio-economic groups, particularly if availability of over-the-air programming was reduced by pay-TV's introduction. This assertion presumes that increased access to cultural events would not necessarily encourage habitual non-consumers of culture to commence consumption.[5] On the other hand, if pay-TV programming concentrated on films having wide audience appeal and on popular entertainment and sports events, lower-income groups could be substantial beneficiaries, provided the costs of pay-TV viewing were significantly below direct charges for attending such events. The ultimate disposition of pay-TV revenues also has potentially important distributive consequences. For example, if a substantial share of the revenue raised from pay-TV were redistributed to the production sector, the overall impact of pay-TV's introduction could be quite progressive. This follows from the presumption that pay-TV viewing charges would on balance be progressively distributed, and that levies on revenues from pay-TV would largely supplant current tax subsidies to film and culture, which on balance are regressively distributed.

In sum, distributive consequences associated with the provision of pay-TV services are far broader than the conventionally expressed concerns about "unwarranted" windfall profits accruing to the licensee. Indeed, one can argue that implementing pay-TV would alter the current distribution of benefits and costs associated with the production and distribution of Canadian culture to effect a transfer of net benefits from higher socio-economic groups to lower socio-economic groups. However, as noted above, favourable patterns of income redistribution (i.e., transfers from high-income to low-income families) attending pay-TV's introduction will be strongly conditioned by the nature of pay-TV programming. In this regard, programming that emphasized arts and culture rather than mass popular entertainment would mitigate some of the redistributive benefits of introducing pay-TV. Unfortunately, the goal of promoting Canadian arts and culture through the medium of pay-TV is likely, in the short run anyway, to be income regressive. However, there is some evidence that a "taste" for the arts is encouraged by early exposure to artistic performances.[6] Pay-TV could therefore be an efficient and effective medium to provide widespread childhood exposure to the arts. In this case, no long-run conflict need exist between distributional equity and the promotion of the performing arts and specialized cinema in Canada.

Allocative Efficiency and Pay-TV

The allocative effects of any public policy generally constitute the major concern of the economic analyst. A facilitating assumption ordinarily made in this regard is that policies affecting prices and output in one sector of the economy have, at most, marginal impacts on costs and prices in other sectors. This assumption is more or less tenable depending upon the sector under consideration. For the purposes of this analysis, we will consider the relevant sector to be the Canadian broadcasting and programme production industries. Given this relatively broad sectoral definition, the use of a partial equilibrium analysis might not be too damaging.

Allocative efficiency in terms of incomes can be simply defined as achieving the maximum aggregate income. While potential increases or decreases in money (or real) income are a relevant measure of allocative efficiency, for many purposes they are an inadequate index of an individual's well-being. For example, a relevant consideration in this regard is that a person may derive satisfaction from reservation uses of his (or her) resources, for example, leisure, as an alternative to maximizing his (or her) market income. Another consideration is that an individual's well-being will be related to how he (or she) spends his (or her) income over different consumption goods. Thus, it is reasonable to assume, all other things being constant, that consumers are better off with greater choice. This is a particularly relevant consideration when evaluating the issue of pay-TV, since one presumed benefit of its introduction is the greater variety of programming that would become available to viewers. In addition, conventional measures of income often fail to capture adequately changes in the quality of goods and services produced. This is also potentially relevant when considering the pay-TV issue, since potential changes in the nature of television programming could result from the introduction of pay-TV. In this regard, specific concern has been expressed about an influx of American programming attending the introduction of pay-TV in Canada.

Given that income-based measures of allocative efficiency are somewhat narrow, most welfare analyses of public policy initiatives rely upon the concepts of consumers' and producers' surplus to evaluate the allocative implications of any specific policy. Consumers' surplus is defined as the difference between what consumers would be willing to pay for each quantity purchased and the price charged by the market aggregated over the total quantity purchased. Producers' surplus is defined as the difference between the minimum price a producer would be willing to accept at each quantity supplied and the price the market offers the producer aggregated over total quantity sold. The algebraic sum of consumers' plus producers' surplus, that is, total surplus, is one conventional index of allocative efficiency employed in policy analysis.

An important qualification to the use of conventional "surplus" measures as an allocative criterion for pay-TV's introduction should be noted. Specifically, it does not easily allow for changes in the nature of the output produced. That is, output units are presumed to be homogeneous; however, as noted above, changes in the nature of the "viewing output" produced are a presumptive consequence of introducing pay-TV. Hence, the aggregate surplus concept must be capable of incorporating product variety as a component of social welfare.

An approach to demand analysis that incorporates product features is outlined in Figure 1. In this approach, goods are defined in terms of attributes or characteristics.[7] For example, if the "good" in question is television programming, the characteristics might include educational content, dramatic content, musical content, and so forth. Figure 1 represents a simplification in that only two possible characteristics are dimensioned, while in practice the enjoyment or use of a good will depend upon a variety of characteristics.[8] Thus, positions along the axes represent different amounts of characteristics Z_1 and Z_2. It is presumed that a consumer is able to describe different combinations of characteristics Z_1 and Z_2 that would leave him (or her) equally well off. That is, the consumer is presumably able to define indifference curves in the $Z_1 Z_2$ characteristics' space. Combinations of Z_1 and Z_2 that reflect more of at least one characteristic and no less of the other are preferable positions for the consumer. That is, points along indifference curve I_2 are preferred to those along I_1.

Ordinarily, products will be available that provide satisfaction to the user in the form of the two characteristics, Z_1 and Z_2, given in some proportion. One such hypothetical product is described by the ray *OA* in Figure 1. Consequently, point *X* might represent a unit level of

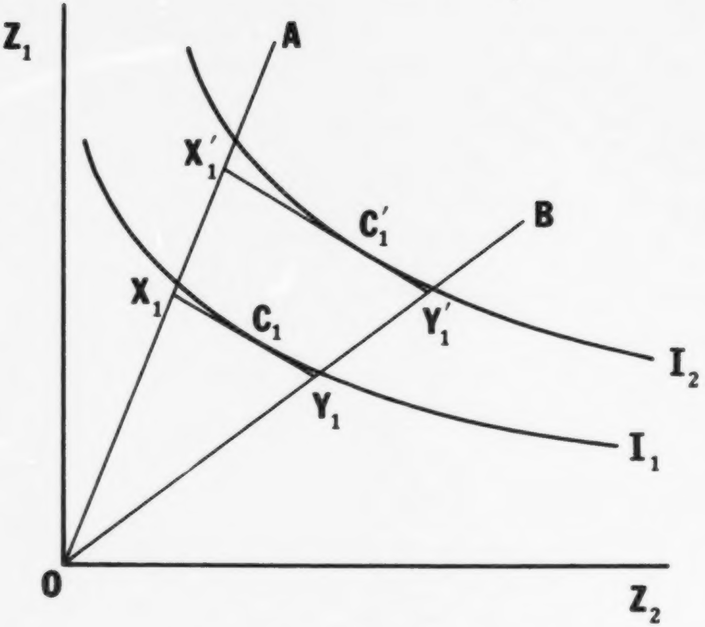

Figure 1
THE CHARACTERISTICS MODEL

consumption of a good that provides consumers with characteristics Z_1 and Z_2 in a ratio given by the slope of *OA*. A second product is described by the ray *OB*, and its slope would be interpreted in an analogous fashion; that is, it identifies the proportions in which Z_1 and Z_2 are provided for different consumption levels of the second good. Point *Y* would therefore represent a unit level of consumption of the second good.[9] To provide some content to this model, the two axes might be thought of as "drama" and "comedy" in a vector space that describes television programming material. The two rays (*OA* and *OB*) might be thought of as describing the output mix provided by public broadcasters (e.g., the CBC) and private broadcasters (e.g., CTV network) in Canada. Thus, if Z_1 represents different intensities of drama and Z_2 different intensities of comedy, it is seen that public broadcasting concentrates on dramatic programming, while private broadcasting concentrates on comedy.

If it is technically possible to consume linear combinations of the two goods, for example, alternate watching both public and private broadcasting stations, points along the line connecting X_1 and Y_1 would represent unit-level combinations of goods one and two. If a consumer had sufficient income to buy one unit of good one or good two, or any combination of the two goods given by line X_1Y_1, the consumer would choose the combination at point C_1 given indifference curve I_1.

The potential impact of introducing pay-TV on consumer welfare can now be introduced through the use of Figure 1. Conceptually, the introduction could affect the consumption opportunities of television viewers in a variety of ways. For example, it might facilitate an increased consumption of both characteristics for a given expenditure outlay by allowing the two goods, that is, public and private broadcasting, to be produced more cheaply. Thus the introduction of pay-TV might allow a typical viewer to consume both drama and comedy more cheaply than he or she otherwise could. In Figure 1, this would be represented by a parallel shift outward of the X_1Y_1 line (to say $X_1'Y_1'$).[10] The introduction of pay-TV would allow a consumer to achieve a higher level of satisfaction, given by point C_1, with no necessary increase in expenditure outlay. Clearly this would represent an increase in consumer surplus. Moreover, consumer surplus would be unambiguously increased regardless of the precise shape of the consumers' indifference curve, that is, regardless of the distribution of tastes between comedy and drama in Figure 1.

Pay-TV's introduction might facilitate an increase in one or the other characteristic for a given expenditure outlay. For example, Figure 2 shows the effect of pay-TV's introduction increasing the amount of characteristic Z_1 (drama) available for a given resource outlay. Again, presuming at least some cost savings are passed on to consumers, the consumer can ordinarily attain a higher satisfaction level with no increase in expenditures. A potential complication should be noted, however. To the extent that a relative shift in consumption takes place towards Z_1 and away from Z_2, the survival of producers of goods heavily embodying characteristic Z_2 might be jeopardized, particularly if production of these goods is characterized by significant economies of scale.[11] Ordinarily, public policy is neutral to the implications of an expansion of one production sector and the contradiction of another. However, certain production activities may be valued beyond their immediate market contribution, particularly in the cultural area. Thus, a relative contraction in sectors producing characteristic Z_2 intensively might be considered to have large social costs if those sectors were highly valued for non-pecuniary reasons. For example, the sectors in question might provide important public affairs services or contribute greatly to promoting a Canadian "cultural identity."

A third potential impact of pay-TV's introduction can be illustrated if we assume (realistically) that it is sometimes impossible to combine goods to produce alternative combinations of characteristics Z_1 and Z_2 given by line X_1Y_1.[12] Referring to Figure 1 again, it can be seen that

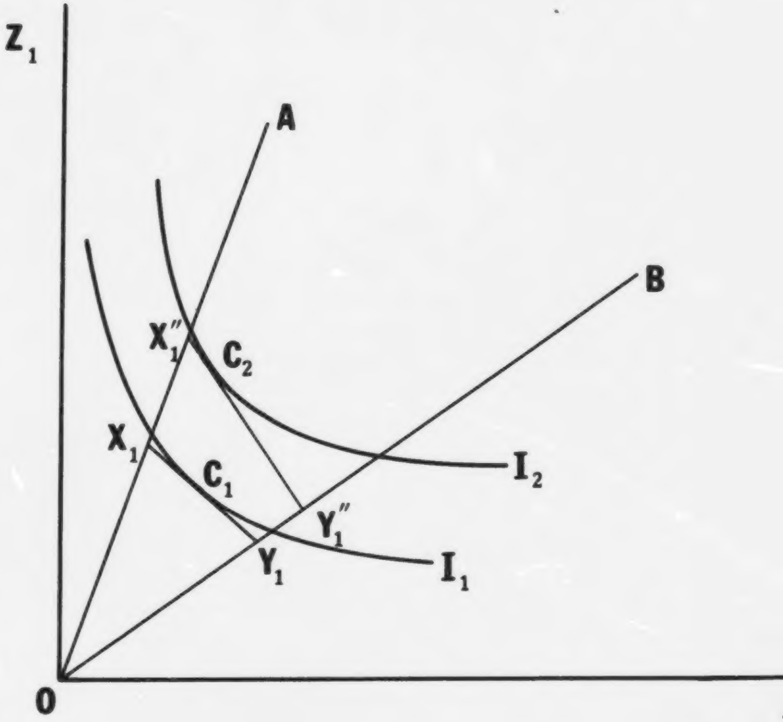

Figure 2
"NON-NEUTRAL" DESIGN ENHANCEMENT

the consumer is better off by being able to locate at point C_1 giv indifference curve I_1. Thus, if pay-TV's introduction facilitated t consumption of characteristics Z_1 and Z_2 in the ratio given by the slo of a ray drawn from the origin through C_1, it would make at least so consumers better off. Clearly, the greater the number of possi combinations of Z_1 and Z_2 that are facilitated, the greater t improvement in consumer welfare. Put in other words, a policy chan that facilitated the consumption of Z_1 and Z_2 in different proportio would be less significant (in terms of improving consumer welfare) t greater the number of alternative combinations already available a the more homogeneous consumers' tastes.

The preceding analysis considered how changes in consumer surpl are conceptually related to pay-TV's introduction.

It is worth briefly summarizing the main points:

1. To the extent that pay-TV reduces costs of consuming all programming "characteristics" by an equal proportionate amount, and to the extent that these costs savings are passed on to viewers (to some extent), consumer welfare will unambiguously increase.
2. To the extent that pay-TV's introduction reduces costs of consuming certain characteristics more than others, consumer welfare will ordinarily increase; however, externalities may be created by the relative (or absolute) contraction of favoured sectors.
3. To the extent that pay-TV's introduction facilitates the consumption of "new" characteristic combinations, the benefits to consumers will depend partly upon the substitutability between the old and new services. It will also depend upon the impact of greater product diversity on overall costs of production in the sector.

Apropos the impact of pay-TV's introduction on consumer welfare, there would appear to be two key questions. Would its introduction significantly reduce the costs to consumers of achieving a given "basket" of programming characteristics? Would its introduction significantly expand the range of choice facing the consumer?

Finally, the potential impact of pay-TV's introduction on producers' surplus must be considered, since the overall welfare impact of a given public policy is conventionally evaluated as the change in consumers' plus producers' surplus.

Formal models have been suggested in the literature to evaluate the impact of new product introduction on overall (i.e., producers' plus consumers') surplus.[13] Since the models are relatively complex and (to some extent) only reinforce conclusions drawn from models of consumers' surplus, we merely summarize their relevant conclusions. A fundamental conclusion is that introducing a new product that is a very close substitute for existing products will have a relatively small demand-expanding effect, and will primarily result in producers of existing products losing sales (and associated profits) to producers of the new product. This is a very familiar concern raised by over-the-air broadcasters about the introduction of pay-TV; that is, it will merely result in fragmentation of existing audiences.

The adverse impact of a new service's introduction on existing producers will be increased if production of the relevant service is characterized by economies of scale, since cut-backs in production may increase unit costs. In the Canadian context, the relevant concern is that audience fragmentation (particularly fragmentation associated with satellite transmission of American programming) will reduce demand for Canadian-produced material. Unit costs of production for such programming will increase to the extent that production is characterized by economies of scale. Forgone scale economies may raise costs to consumers, thereby further reducing overall surplus. On the other hand, if the introduction of a new service and the subsequent loss of market share for existing producers touches off a price war (e.g lower advertiser rates), the impact on consumers' surplus is somewha ambiguous.

Our analysis of pay-TV's potential impact on overall economi surplus can be summarized as follows: the likely impact will b positive if the new services provided by pay-TV differ significantl from those provided by other delivery sources, and if the Canadia viewing public has a "taste" for diversity. It will also be positive to th extent that the introduction of pay-TV lowers the costs to consumers c realizing any given level of viewing output. On the other hand, th likely impact will be negative if the new services provided substantially duplicate those offered by existing suppliers, thereby resultin in market fragmentation with siphoning of viewers away fron existing suppliers. The social costs of any such market fragmentatio would be accentuated if viewers were siphoned away from Canadian produced programmes to foreign-produced programmes, particularly i the cultural production process is characterized by economies of scale.

Fairness and Pay-TV

The fairness criterion is conceptually straightforward. Economist generally have very little specific to say about fairness as a social goa and tend to adopt the view that, all other things being constant, publi policies should strive for "horizontal equity"; that is, individuals i like circumstances should receive like treatment. In this regard, ther are strong grounds for arguing that individuals in reasonabl comparable circumstances were not being treated equally under CRT policies towards pay-TV prior to the 1982 licensing decision.

The issue of whether it is "fair" to implement one or another pay-T proposal or to postpone its introduction indefinitely ultimately is subjective one; however, one thing seems clear: the pre-licensin status of pay-TV in Canada was not recommended by considerations o fairness. Specifically, certain geographic areas of the country (an certain market segments) were already being served by pay-TV eithe with or without federal government approval. For example, pay-T services were available in Saskatchewan. This could be considere unfair to cable operators in other provinces who had been threatene with legal action if they started pay-TV services. Moreover, privat entrepreneurs were providing satellite-receiving equipment to customers that in turn were used to "pirate" American pay-TV signals. I one case, the provincially owned telephone company in Manitob provided satellite-receiving services to one such entrepreneur sellin pay-TV signals to about two hundred subscribers in Falcon Lake.

The rationale for tolerating such illegal services in some areas whil threatening a legal crack-down against the use of satellite dishes i other areas was explained by CRTC Chairman John Meisel as recognition of the limited television reception in remote areas.[14] While increasing the available television reception in remote areas is a laudable goal, it was not fair to provide a relatively small subset of the population potentially greater viewing choice than the bulk of Canada's population. Moreover, pay-TV or similar services were available to specific categories of users and not others. For example, hotel pay-TV was begun in Toronto as early as 1972. In 1981, Rogers Telecommunications Ltd. was supplying 11 000 rooms in twenty Toronto hotels with pay-TV movies. In Vancouver, a subsidiary of Premier Cablevision Ltd. had operated a hotel pay-TV system since March 1976. Closed-circuit pay-TV, a form of pay-TV in which the receiving and originating equipment are directly linked by cable, microwave, or telephone lines, began operation in 1974 in a Toronto condominium.[15] In these cases as well, it was unfair to allow mode of residence to determine the availability of pay-TV or closed-circuit television services.

Arguments have been raised that the introduction of pay-TV will inflict unfair treatment on certain groups. One argument is that pay-TV's introduction is unfair to private and public broadcasters. We find this specific argument unpersuasive, since over-the-air broadcasters enjoy the use of a socially endowed property right from which they have earned significantly above-average returns to invested capital.[16] It is hard to entertain the claim that increased competition in this sector is unfair when it is ostensibly a desirable public objective in most other sectors of the economy. In addition, nothing prevents the networks from realizing revenue benefits by supplying programmes to pay-TV systems. Finally, there is only modest evidence from American experience that pay-TV has contributed to network slippage.[17]

Another set of fairness considerations relates to Canadian producers, creators, and performers of recorded material. The specific concern here is that access to specialized American programming via satellite transmission (presumably delivered through a pay-TV system) would siphon audiences away from Canadian programmes, thereby reducing employment opportunities for Canadian programming and creative talent. Unless the latter merited special consideration, this argument would have no greater relevance than when used in protectionist pleadings by any other group of producers or employees. However, "cultural" factors of production are clearly seen by Canadian policy makers as warranting strong measures of protection. The siphoning claim must therefore be examined more closely.

If Canadian pay-TV patterns mirror those of the United States, feature movies and sports events will comprise the main sources of entertainment.[18] Since telecasts of major American sports events are already fairly accessible to Canadian viewers on over-the-air broadcast stations, it is unlikely that additional access to these events will reduce demand for Canadian sports telecasts on the part of Canadian viewers. A more relevant concern is that increased access to low-cost premier American movies could reduce demand for Canadian-produced films. The extent to which any such substitution took place would depend heavily upon the nature of forthcoming Canadian films. If Canadian feature films continue to reflect a "Hollywood format," the degree of substitutability between American and Canadian films will be quite high; however, in this circumstance, it is valid to question whether a contraction in Canadian feature film production would represent a blow to the preservation of Canada's "cultural identity," unless such preservation is achieved by the simple expedient of keeping film producers, cinema lawyers, and accountants gainfully employed. Conversely, feature films that are distinctly "Canadian" may be quite limited substitutes for American feature films. In this case, audiences for Canadian feature films may be largely unaffected by marginal increases in the availability of American films.[19]

It should also be noted that many Canadians associated with the production of commercial films already benefit substantially from legislation such as the 100 per cent capital cost allowance on Canadian feature films and the Canadian content requirements imposed on television.[20] The costs of these subsidies are distributed broadly across all Canadian taxpayers and consumers. In our opinion, the Canadian film industry has been the beneficiary of substantial legislative advantages. It is somewhat cynical, therefore, to suggest that any additional exposure to foreign competition is unfair to the industry.

In summary, fairness arguments raised against the implementation of pay-TV are unpersuasive. This is particularly so in view of the fact that most proposals dealing with the implementation of pay-TV incorporate provisions for redistributing a percentage of the earned revenue to Canadian programme production, or (analogously) for imposing stringent Canadian content requirements on new television services. Most proposals also recognize the "need" to implement controls against duplicating material shown on conventional television stations.[21]

Further Observations on the Introduction of Pay-TV in Canada

Our preceding consideration of the distributional, allocative, and fairness impacts of pay-TV has led to the conclusion that its introduction would increase economic surplus if pay-TV reduced the costs of consuming any given set of viewing characteristics. It is generally acknowledged that pay-TV can facilitate the provision of movies and other entertainment events to a wider audience at lower cost than conventional distribution outlets such as movie theatres. Of course, by its nature, the output of pay-TV is not strictly comparable to attending cinema or live entertainment events. Hence, it is not strictly possible to conclude that pay-TV unambiguously lowers the costs of consuming any given set of viewing characteristics.

We also noted that pay-TV's overall impact on economic surplus would be conditioned by the type of programming carried. More specifically, the overall increase in economic surplus is likely to be small if the programming carried on pay-TV largely duplicates programming available on existing stations. On the other hand, the increase could be quite substantial if pay-TV programming is unique.

To a great extent, regulatory authorities in Canada can control the nature of the material carried by pay-TV distributors through establishing anti-siphoning programming codes similar to those established by the Federal Communications Commission in the United States.[22] Assuming that fairly stringent anti-siphoning legislation is put in place, the relevant issue will become whether or not sufficient demand for specialized pay-TV programming exists in Canada to justify the overhead costs of implementing the service.

Expected Demand

Survey estimates of potential demand for pay-TV are somewhat meaningless in this context, since the nature of such surveys is quite hypothetical, in the absence of definite programming content. Moreover, available survey results are somewhat inconclusive. The CRTC's 1977 survey of audience demand for pay-TV led it to conclude that pay-TV was not "essential" for subscribers, and that there was no compelling demand for this new programming source. However, the CRTC has acknowledged that there is likely to be a substantial demand for pay-TV once it is introduced, although penetration on the scale reached in the United States is not expected.[23] Virtually all observers conclude that demand for pay-TV in Canada is likely to be positively related to the amount of American programming carried; however, there is disagreement on this score over how much demand would be affected by imposing Canadian content requirements. Based upon preferences already revealed in the market place (i.e., the manifestations of demand for satellite reception and closed-circuit television in hotels and apartments), it seems reasonable to conclude that demand for pay-TV is probably sufficient to justify overhead costs, even with fairly rigid anti-siphoning provisions in place.

Revenue Diversion

The allocative benefits to consumers (i.e., increases in consumer surplus) will clearly be greater, the fewer the restrictions on pay-TV programming content and the lower the charges for pay-TV viewing, other things being constant. However, unrestricted programming content is unlikely to be fully consistent with the federal government's objectives to promote Canadian content in broadcasting and rapid growth of the programme production sector in Canada. Indeed, there is something of a policy trade-off implied between consumers' and producers' surplus in the choice between increased programming diversity (and lower costs) and Canadian content on pay-TV. More specifically, it is axiomatic that restricting American programming on pay-TV reduces Canadian viewers' diversity of choice. It is also clear that American programming can generally be purchased at lower costs than comparable Canadian programming can be produced given economies of scale in programme production. Since policy makers apparently have a strong commitment to the growth of Canada's programming sector, some transfer of surplus from consumers to film producers and the like is undoubtedly to be expected. The issue of how to effect this transfer in an efficient way therefore deserves some attention. Several proposals have been raised in a policy context: (1) tax the revenue from pay-TV sales and rebate a portion of the taxes to the production sector; (2) impose stringent Canadian content requirements on pay-TV programming; (3) impose a combination of both measures.

It is not possible for us to evaluate fully the various proposals designed to ensure that pay-TV contributes to the stability and growth of the Canadian film and programme production industries; however, several relevant points might be noted. One is that imposing stringent Canadian content requirements for pay-TV could restrict the growth of demand for the service, thereby indirectly limiting opportunities for Canadian producers and other productive inputs. In economic terms, Canadian content requirements would promote a substitution of Canadian for foreign-produced programming on pay-TV; however, the overall growth of pay-TV might be slowed significantly as a result, thereby leading to less Canadian material being broadcast on television in the long run than would otherwise be the case. Moreover, content requirements could significantly blunt competitive pressures on the Canadian programme production industry to produce output that appeals to Canadian viewers. Second is that while taxing the revenue from pay-TV to subsidize the programme production sector would likely be paid, in large measure, by consumers, the consumer would also enjoy a broader diversity of choice. Furthermore, the Canadian production industry would have to confront international competition, a force that is presumed to have salutory effects in other industries. It might also be noted parenthetically that, to date, Canadian content has been measured purely as a quotient of total broadcast output. No allowance is made for quality of output, nor is any incentive to produce "significant" Canadian works imparted by existing legislation. It seems arbitrary (at the least) solely to encourage "quantity" of output and not "quality" of output as well. A system whereby some portion of revenue raised from pay-TV is remitted to the programme production industry would be neutral at least with respect to the quantity versus quality trade-off.

Cross-Subsidization

The question of how to distribute the revenues from Canadian pay-TV brings the concept of cross-subsidization to the fore. Cross-subsidization involves the direct or indirect transfer of income from one economic group to another. In the pay-TV context, the most prominent cross-subsidy issue, as noted above, relates to the likelihood that some portion of the revenues earned by the ultimate operators of Canadian pay-TV will (directly or indirectly) be transferred to producers and other participants in the creation of original Canadian programming. To the extent that these two groups overlap in identity, the relevance of the cross-subsidy issue is mitigated to some extent.

As our preceding discussion suggested, the ultimate incidence of cross-subsidization schemes ordinarily differs from the initial incidence. The ultimate incidence depends upon how the subsidy scheme is implemented and upon the nature of the markets in question. For example, a transfer of revenue to the production sector might primarily benefit a handful of Canadian performing artists if the latter are the scarce factor of production in the original programming production process. If a universal funding scheme were implemented, whereby all cable subscribers paid a fee for pay-TV, whether they watched pay-TV channels or not, the ultimate cross-subsidy could go from the broad cable-subscribing population to a relatively small number of Canadian producers and performers.

As a rule, economists do not favour tampering with market processes in order to effect income transfers between different groups in society. Rather they favour using government tax and subsidy programmes to transfer income directly from one target group to another. The primary reason for this preference is that the costs of indirect transfers effected through market processes are often obscured from the public, and rational evaluation of the net benefits of the transfers is, therefore, extremely difficult. Also, transfers effected through market processes often have unintended and undesirable consequences upon production efficiency. Thus, if society deemed that some revenues earned by pay-TV operators should go to Canadian film production companies, economists would prefer, for example, that the transfer be accomplished by placing a profit-surcharge tax on pay-TV operators and giving a lump-sum subsidy to film production companies rather than by imposing a Canadian content quota on pay-TV operators.

Methods of Delivery and Operational Formats

Some discussion has taken place on the nature of a Canadian pay-TV system. Most policy analysts have urged the introduction of a national system through the vehicle of a single pay-TV agency that would purchase programmes and distribute them to local exhibitors.[24] This view is based on a presumption that significant economies of scale in production, administration, distribution, and marketing exist in film and programme production. A national network has also been seen as having monopsony power in purchasing American programming; however, the evidence on economies of scale is largely anecdotal in nature and is premised on an American model of the industry. The potential for mitigating scale diseconomies through greater specialization and eschewing the use of high-budget "stars" (for example, along the lines of the Australian film industry) has essentially been ignored by proponents of a single pay-TV network, as has the potential for this monopoly to be very inflexible in its programming.[25]

A related consideration is whether pay-TV service should be delivered by existing cable operators, common carriers, over-the-air broadcasters, or yet some other group. On the surface, it would appear that pay-TV is a natural extension for cable distribution systems employing satellite transmission; however, persuasive evidence on the relative costs of different pay-TV distribution systems has not, to our knowledge, been presented. The important caveat we would raise is that regulatory decisions apropos the distribution of pay-TV be flexible ones. The experience of the telecommunications industry demonstrates that rapidly advancing technology can change the boundaries of the efficient production unit, and that regulation can retard the evolution of an industry's structure towards one better able to realize the economic advantages afforded by new technology.

A final consideration relates to the payment mechanism to be employed. On the one hand, the cable industry favours a pay-per-channel system whereby the subscriber pays an additional monthly fee if he wants to receive a special pay-TV channel. On the other hand, the Joint Action Committee on Pay-TV and Satellite Policy (comprised of organizations representing television employees, consumers, and independent film producers) has been urging the adoption of a universal system in which every cable subscriber would automatically be billed for the pay-TV service. Quite clearly, the universal system would seriously violate the fairness criterion, in that users and non-users of pay-TV service alike would be treated equally. Also, it is quite likely that cable subscribers choosing the pay-TV option would have higher average incomes than those who do not. A payment system that did not ascribe an added charge for the option would therefore probably be income regressive in nature. Proponents of the universal system argue that it would provide the most revenue for

Canadian programme production. Even if this were deemed a social benefit, it is something of a *non sequitar*, since additional revenue could be made available for programme production through the general fiscal system. It is also argued that a universal system would save costs by obviating the need for expensive hardware to meter pay-TV use. This does not seem an especially compelling argument given that viewers who now get television by cable with a converter box would need only a decoding device on the converter.

Conclusions

Economic analysis of the implementation and operation of pay-TV encompasses three broad areas of consideration: fairness, equity in the distribution of net benefits, and allocative efficiency. Unfortunately, there is insufficient information to be definitive about any of these economic aspects of pay-TV. Nevertheless, our consideration of these issues suggests, on balance, that arguments raised against the introduction of pay-TV are more consistent with the goal of protecting existing vested interests (particularly over-the-air broadcasters) than with promoting economic welfare.

The major argument raised against pay-TV is that it will lead to a flood of American programming in Canada and, hence, to the ultimate destruction of the Canadian programme production industry. The merit of this argument depends heavily upon the nature of Canadian programming. If it continues to be a slavish imitation of the "Hollywood" model, substantial control over the potential competition afforded by pay-TV may well be required to maintain the growth of the Canadian industry; however, the basic premise underlying the very generous legislative treatment provided the Canadian film and programme production industry, that is, promotion of a Canadian cultural identity, would then be subject to question. Conversely, if a genuine and successful attempt were made to create a uniquely "Canadian" product, there might be very limited substitutability between American and Canadian programming.

Consideration of the issues related to pay-TV points up a number of fundamental conundrums facing Canadian cultural policy makers. Perhaps the major one is the need to reconcile profit requirements with the goal of promoting Canada's cultural identity. Clearly, the profitability of producing a feature film in Canada is a direct function of its acceptance in the American market. The recent behaviour of Canadian producers suggests that such acceptance requires following the formats established by American producers. But, as noted above, it is hard to see how this approach to film making promotes the broad cultural interest of Canada. If, indeed, private and public interests in this area cannot be made compatible, existing tax legislation and other programmes designed to promote private-sector production of

Canadian culture are subject to serious question. If they can be made compatible, it is not clear why a protectionist stance apropos vehicles such as pay-TV is required.

Notes

[1] For example, society may have been characterized by an excessive amount of poverty. On welfare economics generally and distributional considerations in particular, see the brief discussion in Douglas G. Hartle, *Public Policy Decision Making and Regulation* (Montreal: The Institute for Research on Public Policy, 1979), pp. 145–72.

[2] This term is used in E.J. Mishan, *Welfare Economics: Five Introductory Essays* (New York: Random House, 1964), p. 121.

[3] Conversely, if the introduction of pay-TV had significant adverse consequences for the distribution of income, its introduction might be made contingent upon implementing other policies that mitigated these adverse distributional effects.

[4] For a review of available evidence on this point, see S.H. Book and S. Globerman, *The Audience for the Performing Arts* (Toronto: Ontario Arts Council, 1975).

[5] Some empirical support for this presumption is found in Book and Globerman, *The Audience for the Performing Arts*.

[6] *Ibid*.

[7] For a full description of this model, see Kelvin J. Lancaster, "A New Approach to Consumer Theory," *Journal of Political Economy* 74 (April 1966): 132–57.

[8] A two co-ordinate specification of the consumers' choice process is sufficient to illustrate our main points.

[9] This result is quite analogous to the standard solution for consumers' equilibrium when the axes are defined in terms of goods rather than characteristics.

[10] This representation presumes that all cost savings are fully passed on to consumers. While not wholly realistic, the assumption facilitates our analysis and does no damage to the derived conclusions.

[11] Put in other words, a shift in consumption towards the now relatively cheaper Z_1 characteristic could cause substantial increases in unit production costs for goods that embody characteristic Z_2 intensively.

[12] For example, it is not feasible to "create" a musical comedy viewing experience by simultaneously watching a comedy programme and a musical concert.

[13] See, for example, F.M. Scherer, "The Welfare Economics of Product Variety: An Application to the Ready-to-Eat Cereals Industry," *Journal of Industrial Economics* 28 (December 1979): 113–34.

[14] See Ross Laver and Stephanie MacKendrick, "Manitoba's Firm Selling Satellite Use to Illegal Operator," *Globe and Mail* (8 October 1980), p. 5. More recently, Communications Minister Frances Fox announced that as the new Canadian satellite services licensed in April 1981 become available, unlicensed earth-station operators will have to apply for a licence to transmit these services and stop bringing in American satellite signals. On 14 April the CRTC issued a licence to Canadian Satellite Communications Inc. (Cancom) of Whitehorse to begin beaming signals through four television channels and six radio channels on Telesat Canada's Anik A–3 satellite by mid-July. The programming will include virtually all the popular shows not carried by the CBC as well as local and Canadian programming.

[15] Canadian Radio-television and Telecommunications Commission, *A Report on Pay-Television* (Ottawa: Minister of Supply and Services Canada, 1979).

[16] For some empirical evidence on the super-normal, risk-adjusted rates of return earned by over-the-air broadcasters, see Stuart McFadyen, Colin Hoskins, and David Gillen, *Canadian Broadcasting: Market Structure and Economic Performance* (Montreal: The Institute for Research on Public Policy, 1980).

[17] Recent Nielsen Company surveys, for example, found that the three networks (NBC, ABC, and CBS) drew 86 per cent of the daytime prime-time audience. But in homes with cable, their share declined to 82 per cent. And in homes with pay-cable channels, the figure was 70 per cent. However, network executives continue to project the growth of television audiences, thereby offsetting any losses to the competing video forms. See The National Research Group, "Cable Television-Audience Impact," mimeo, 1980.

[18] The two most active contenders for Canadian pay-TV service, Pay Television Network Ltd. of Toronto and the Canadian Broadcasting Corporation, CTV Television Network Ltd. and TVA network group, both indicate that basic pay-TV fare in Canada will consist of movies, entertainment shows, and sports events. Additional service might include an arts channel for opera, theatre, and concerts. See David Lancashire, "A Forecast for Canadian Pay-TV," *Globe and Mail* (23 April 1981), p. 7. In this regard, the president of CTV Television Network Ltd. of Toronto recently stated that a rapid expansion of the number of television channels made available through new technologies will not diminish the audience for Canadian programmes. See Dan Westell, "New Channels Felt No Threat by CTV Head," *Globe and Mail* (23 January 1981), p. B3.

[19] This is not to say, of course, that Canadian feature films would be more profitable if they became more distinctly Canadian.

[20] These content requirements include provisions for minimum Canadian content in filmed television commercials.

[21] See, for example, Canadian Radio-television and Telecommunications Commission, *The 1980s: A Decade of Diversity: Broadcasting, Satellites, and Pay-TV* (Ottawa: Minister of Supply and Services Canada, 1980). In its 21 April 1981 call for pay-TV applications, the CRTC said it would not set a minimum Canadian content quota for pay-TV systems at this time. Instead, it decided to judge applications on the basis of three factors — the percentage of schedules devoted to domestic productions, the number of Canadian programmes acquired, and the percentage of revenues spent on domestic material. See Robert Stephens, "CRTC Seeks Originality and Canadian Content in Licencing of Pay-TV," *Globe and Mail* (22 April 1981), p. 3.

[22] For example, the Federal-Provincial Conference of Communications Ministers recommended that programmes available over the present Canadian broadcasting system should not be siphoned onto a pay-TV service. See Federal-Provincial Conference of Communications Ministers, "A Federal Discussion Paper on Satellite Distribution of Television Programming and Pay Television," Toronto, mimeo, 16–17 October 1979.

[23] See *The 1980s: A Decade of Diversity*, p. 59.

[24] See, for example, "Federal Discussion Paper on Satellite Distribution"; *The 1980s: A Decade of Diversity*; and R. Brian Woodrow *et al.*, *Conflict Over Communications Policy: A Study of Federal-Provincial Relations and Public Policy* (Montreal: C. D. Howe Research Institute, 1980).

[25] This concern has been raised in Telecommunications Research Group, "Potential Effects of Pay-TV Development on Canadian Television Program and Film Production and Distribution Capabilities," Simon Fraser University, mimeo, May 1976. Most observers do recommend that the delivery of pay-TV to the viewer be undertaken by a variety of licensed local exhibitors in any given geographical area. This recommendation is consistent with evidence that small CATV systems tend to be more efficient than large systems, given a minimum length of 150–250 miles. See R. E. Babe, *Cable Television and Telecommunications in Canada: An Economic Analysis* (East Lansing: Michigan State University, Graduate School of Business Administration, 1975).

Economic Impact of Subscription Television on the Canadian Communications Industry

6

by
Jeffrey I. Bernstein*
with
Robert J. Goldberger

Introduction

A great deal of interest has emerged over the introduction of various forms of subscription television in Canada. Indeed, since 1976, Canadian "pay-TV" has been termed inevitable. The purpose of this essay is to analyse the major economic effects of subscription television on the communications, information, and related industries.

The immediate question that arises concerns the definition of subscription television. In the following section we discuss the nature of these services and how they relate to over-the-air and cable television. Once the characteristics of the commodity have been analysed, we describe the main actors who will be involved in the supply network. These, of course, are the cable operators, network broadcasters, and exhibition-specific firms.

Each of these actors has proposed how the market for subscription television should be structured. Three proposals are analysed in the essay, one from each of the set of actors. In this way, we are able to illustrate the diverse interests of the different parties. For example, the cable companies want to cartelize the exhibition and the carriage of the service. The broadcasters, for their part, want monopoly control over exhibition by gaining first refusal rights on the programmes that are to form the television package. Finally, exhibition-specific firms tend to favour a competitive market structure. We discuss the effects of these proposals on subscription price, programme quality, corporate profits, employment opportunities, and market structure.

In general, our findings suggest that a competitive environment is best suited for production, carriage, and exhibition of subscription television. Carriage should be by Hertzian waves (including microwave and satellite) or cable. There is no reason for there to be a unique delivery system. Indeed market forces should be allowed to function in determining the method of distribution selected by the exhibitors. We also encourage competition among exhibitors in selecting programmes for Canadian viewers. Market rivalry through competitive bidding would tend to bring about an efficient matching of viewer preferences with programming, thereby allowing a sufficien return to independent producers. In this way, quality programmes fo Canadian origin will be developed.

We support the use of the tax system to encourage the developmen of independent television producers, rather than by specifying quantity regulations on Canadian content. Tax incentives could involve th following: a 100 per cent write-off of shareholder rights in Canadia programmes (and production companies), as in the film industry accelerated depreciation and investment tax credits for independen producers, subsidies for exhibitors packaging Canadian originations and tax credits for firms advertising on Canadian programmes. I general, market forces supplemented by the tax system would appea to yield the greatest benefit to Canadians.

The Definition of Alternative Television Services

Television services, like commodities in general, are defined wit respect to three criteria. These are the spatial characteristics, whic refer to the point of origin of the signal and the distance the signa travels; the temporal characteristics, which refer to the time when th signal begins to be viewed and the duration of the viewing time; an the physical characteristics, which refer to what is the nature of th signal (drama, news, comedy) and how the signal is transmitte Consequently, different television services refer to particular collections of these characteristics.

Related to the concept of television services is the characterizatio of the supply network. In other words, what are the activities involve in supplying television services.[1] First, production (or programm origination) involves the creation of the work. This aspect pertains t classifying "what" the signal is in terms of the physical characteristics. Secondly, exhibition involves the setting up of a programm package (or schedule) that is to be presented to the potentia consumers. This aspect pertains to the spatial and temporal characteristics of television services. Exhibition is a co-ordination rol between what is the nature of the signal and how it is delivere Thirdly, carriage involves the provision of the facilities by which t signal is transmitted. Programme production and exhibition ar concerned with content, while carriage does not entail any conten responsibility.

Let us for the moment focus on carriage or the question of how th signal is transmitted. There are effectively two means by which th signal moves between supplier and consumer. One is over-the-ai broadcast and the other is by some physical connection. Becaus individuals cannot be excluded from receiving over-the-air signal payment from consumers cannot be enforced. This implies that thes television services must be paid through some "indirect" or "non-user means such as tax or advertising revenues. Indeed, television is an interesting example where a commodity can be supplied by the private sector, even though a market does not exist for over-the-air television services. Once the ability to exclude individuals from consuming a commodity without purchasing it has been introduced, private property rights can be established and a market can develop.

Does the distinction between broadcast television and cable television solely reflect the difference in signal transmission? Obviously not. If in all respects, other than transmission, over-the-air and cable television were identical, then no one would demand cable. The reason is not that cable subscribers are paying for what they could otherwise receive for free. Rather they are paying twice for the same service relative to the over-the-air customers. First, payment is effected through the subscription price and, secondly, through taxes and higher prices of the advertised products. Thus the important distinction between broadcast and cable is not only signal transmission. Cable television must also provide additional characteristics that are not available by over-the-air signals. For example, a greater number of channels, originating from diverse places, is one of the added features of cable.

It is useful to refer to over-the-air television signals as primary services. All one needs is a television set. In addition there are subscription services. Cable television is a subscription (or user pay) service that involves primary and a set of secondary services (such as educational, local, and additional American channels). The discussion and related controversy, which has been going on intensely for over a decade, concerning pay-TV is really about the matter of introducing "auxiliary or vertical" subscription television services. These services represent additions beyond the primary and secondary ones presently provided by the cable operators. The interesting feature of these auxiliary subscription services is that the exclusionary device that forces users to pay does not have to be a physical link between supplier and consumer (i.e., a cable). It could be a descrambling device. Hence it is possible to transmit auxiliary subscription services by cable or over-the-air signals.

Industry Actors in the Supply Network

The purpose of this section is to introduce the main actors of the Canadian communications industry who are, or may be, involved with auxiliary television services. An understanding of where these actors operate in the communications arena and how they may fit into the "picture" is a necessary prerequisite to determining the economic impact of this new commodity. As previously noted, there are three activities relating to the supply network — programme production, exhibition, and carriage — and each actor has interests in some or all of these facets. There is the potential for an environment to be created in which firms that have hitherto operated in a non-competitive manner may find themselves in competition with each other over the rights to the provision of these services.

We begin with the cable companies. As of the 1979 broadcasting year (the last year for which a full set of Statistics Canada data are available), 4.084 million Canadian households subscribed to cable.[2] This represents an 8.2 per cent increase in subscribers over 1978 and is a gain of about one million from the 1976 broadcasting year. In addition, 68.7 per cent of the households in cable-franchised territory subscribed in 1979. However, many cable systems have reached penetration levels of over 80 per cent, indicating that subscriber growth will begin to diminish.

Cable companies are monopolies in a sense that the Canadian Radio-television and Telecommunications Commission (CRTC) regulates entry not only into the industry, but also into service territories. Each cable operator is licensed for a distinct area. However, mergers and acquisitions, although regulated, can occur. Thus there is not a one-to-one correspondence between operating companies and ownership. As of 1979, 53 per cent of cable subscribers purchased services from the five largest companies. Indeed this trend towards ownership concentration seems to be continuing with the announcement that Capital Cable TV Ltd. and Cable West TV Ltd. plan to merge. If the merger is approved by the CRTC, the resulting company will be the fourth largest Canadian cable operation, with 250 000 subscribers in sixteen territories.

With respect to auxiliary television services, cable firms are interested in all three aspects of the supply network. Rogers Cablesystems Inc., the largest cable company in Canada with 1.1 million subscribers and a national market share of 28 per cent, will not only benefit from the carriage segment but also from the programming end, as Rogers owns 48.9 per cent of Famous Players Ltd. Other major cable operators that will benefit are Maclean-Hunter Cable TV Ltd., and Moffat Communications Ltd., which operates in Winnipeg, Edmonton, and rural Alberta; as well, Selkirk Communications Ltd. should gain through TOCOM Canada Ltd., which has the exclusive distribution rights for a non-broadcast system that provides fire and burglar alarm services.[3]

Technologically, cable has the potential of offering a much larger range of services than are presently available. The 300 MHz capacity of the coaxial cable used in cable television systems is roughly three hundred times that of the copper-paired wire used by telephone companies. Moreover, recent innovations have increased the cable system band to 400 MHz and 52 TV channels (from the present 35).[4] Present CATV systems have the potential to be transformed into high-speed information-processing systems and subscribers will soon be able to use a two-way television system, as field trials will be going on over the next few years with Canada's Telidon.

Another set of actors is the telecommunications common carriers, of which there are two national systems. The first, the TransCanada Telephone System (TCTS) is composed of the nine major telephone companies and Telesat Canada.[5] The second national carrier is CNCP Telecommunications, a joint venture of Canadian National and Canadian Pacific. The members of TCTS are monopolists in the provision of local and long-distance voice services, but they compete with CNCP in long-distance data transmission, message record services, and the leasing of domestic land-lines and microwave circuits to radio and television.[6] In addition, with respect to terminal equipment, TCTS and CNCP are beginning to face competition from firms in the computer and electronics industries. Nevertheless, TCTS is still the dominant force in Canadian telecommunications. In 1978, TCTS telephone-related operating revenues were $4.2 billion, which were comprised of $2.2 billion in long-distance and $2.0 billion in local and other revenue. This compares with CN Telecommunication's estimated 1978 revenues of $155.3 million and CP Telecommunication's estimated revenues of $85.5 billion.[7] Common carrier interest in subscription television centres around the provision of specialized services, such as subscriber billing and collecting information on viewer preferences, rather than production or carriage.

The members of TCTS operate in a variety of government-controlled environments. For example, Bell Canada and British Columbia Telephone are federally regulated by the CRTC on a rate of return basis. The carriers in the Maritimes and Newfoundland are provincially regulated by rate of return, while the carriers in the prairies are provincial Crown corporations. CNCP and Telesat Canada are also federally regulated.

The next set of major players are the network broadcasters: the publicly owned CBC, and the privately owned CTV, TVA, and Global. Private television stations in Canada as a whole have had a steady 14.3 per cent per year growth rate, rising from $42.8 million in 1970 to $139.2 million in 1979. This compares with cable television revenues, which increased from $22.1 million in 1967 to $313.7 million in 1979 for a 24.8 per cent per year revenue growth rate.[8] The CBC now reaches over 98 per cent of Canada's population (96 per cent for CTV) and its parliamentary appropriations over the last few years have been in excess of $525 million. This appropriation works out to about $1.60 a month that each taxpayer contributes to television provided by the public sector.

Broadcasters are regulated by the CRTC with respect to entry, quantity, and quality of service and Canadian content. Although the

CBC is regulated by the CRTC, the Broadcasting Act gives the network a special role and responsibility not accorded to the private-sector broadcasters. The networks are mainly involved with origination and exhibition. Auxiliary services, which will not necessarily be delivered by cable, have the potential to create an increasingly competitive relationship between the broadcasters and the cable companies. As in some parts of the United States, the signal could be carried on over-the-air channels, provided the subscriber has the appropriate descrambling device.

The last group involved with pay-TV is the exhibition-specific firms. Among the major enterprises in the United States are Home Box Office and Showtime, while in Canada potential exhibitors include enterprises such as Lively Arts Market Builders Inc. (LAMB).

Home Box Office (HBO) began in the United States, in the fall of 1975, and grew from 195 000 to over 4 million subscribers in less than four-and-a-half years. Its service is available on more than 1700 American cable systems, and more than half of HBO's cable affiliates serve fewer than 5000 subscribers. Payment is by a monthly subscription flat fee, and for this fee of $8 each month about 240 hours of various types of programming are provided. During 1980, HBO planned to show more than 200 movies that were acquired from Canadian and American sources and to spend more than $20 million on entertainment specials.

Showtime is the second largest and fastest growing pay-TV service in the United States. It serves 600 000 of the estimated 6 million subscribers in the United States. Showtime was the main supplier of programming to Teletheatre, which offers pay-TV services in Saskatchewan for a $10 monthly fee.[9] According to Teletheatre, pay-TV in Saskatchewan has a market size that is expected to reach 10 000 subscribers by year end 1980 and 60 000 within five years. Showtime, itself, has committed $3.5 million to co-productions with Canadians, from forecasted revenues of $50 to $60 million.

LAMB is a privately owned Canadian company involved in various segments of communications including television, videodiscs, and videocassettes. If given the opportunity to exhibit pay-TV, the firm is prepared to spend $10 million for programming in its first year, of which $8 million would go to funding new Canadian production.

Economic Analysis of the Industry Proposals

Proposals regarding pay-TV have originated from many distinct groups. The ones we shall deal with emanate from the cable companies, network broadcasters, and the exhibition-specific firms.

Proposals from the Cable Companies

The major proposal from the cable companies has emanated from the Pay Television Network (PTN), an enterprise consisting of 125 cable operators.[10] PTN serves more than 3.3 million households, which is equivalent to about 80 per cent of all cable subscribers in Canada. PTN proposed a joint venture that would consist of the private broadcasters, independent programmers, and cable operators and would provide a national pay-TV service. This was a classic attempt at cartelizing the supply of pay-TV and thereby minimizing competition.[1] Subsequently, the PTN proposal has been modified and now takes the form of Canadian Première Television Network.

The ability to cartelize an industry is facilitated when the price elasticity of demand is low and when producer entry is costly. Moreover, there are two major costs of cartel formation. First, there is the negotiation cost that arises in the attempt to set the cartel price and the distribution of output among the different producers. Secondly, the enforcement cost involves monitoring the agreement against defectors. After the cartel "rules" have been established, each producer has the temptation to slightly lower price in order to expand sales and increase profits. The cartel will collapse if enough members become involved in this practice, especially if the price cuts are concealed from the other members. However, in situations where a small number of members produce a homogeneous product, it is relatively easy to arrive at a common solution agreeable to the individual firms in the cartel. The private benefits of cartelization (those accruing to the members) consist of producer prices above competitive levels, lower quality leading to greater profits, and the freedom from the costs associated with competitive behaviour.

A cartel consisting of the private broadcasters, independent producers, and cable operators would likely result in conflicts of interest among the three sets of participants. First, the cartel involves monopolization of auxiliary television services, not only in a horizontal fashion (e.g., across exhibitors), but in a vertical configuration as well. It would be in the interest of the originators to receive as much as possible for their efforts while the exhibitors will attempt to minimize their costs associated with programme purchases. Thus negotiation and enforcement costs are high. In addition, the cartel would not succeed because the price elasticity of demand is presumably quite high for the auxiliary services, since one of the alternatives is to watch over-the-air cable television. Secondly, unless artificial barriers to entry are erected, for example, through government regulation, entry into the exhibition arena is relatively cheap. Entry costs are not unduly high and there are many firms in various aspects of the entertainment business that would find it profitable to be exhibitors. Thus there are no reasons to cartelize the industry.

Proposals from the Broadcasters

There have been a number of proposals from the broadcasters, including the CBC, CTV, and TVA, but the general thrust of broadcaster concerns can be examined through a consideration of the proposal of the Canadian Association of Broadcasters (CAB).[12] The CAB's proposition is a two-level package combining a remote/rural service and a pay-TV service. The latter would be used to cross-subsidize the former, while meeting the national broadcasting objectives. The CAB proposes that pay-TV be provided by a single national operator who is responsible for the acquisition of programming and national exhibition and carriage. This operator should be a private corporation controlled by the broadcasters with minority interests going to the cable operators and programme producers. The CAB, in attempting to establish the dominant position of the broadcasters, desires to guarantee this group first refusal rights before special events or films can be carried by the other actors. In addition, if auxiliary services are permitted, viewers should not be required to pay for regular cable service in order to receive these new services. This proposal is similar to the cartel organization suggested by the PTN, only that the broadcasters are not in favour of pay-TV, although if it is introduced, they would like to control it.

There are a few notable features of this proposal. First, in line with a competitive framework, it should not be necessary for viewers of these auxiliary services to subscribe to cable. Secondly, the payment for receiving these services would be higher than in the previous proposal because of the subsidy to the remote/rural areas. Besides the fact that it is not clear how the cross-subsidization would be accomplished, the only way this pricing scheme would be sustainable is if entry-preventing regulations are introduced. The reasoning is simple. For a subsidy to be feasible, the subsidizing group must be paying above marginal costs for the service. Consequently, under free entry a new producer could arrive on the scene and offer the auxiliary services at a lower price equal to marginal cost. The only way to prevent this phenomenon is to regulate price and this can only be accomplished when entry is controlled. Price regulation, without entry controls, would soon become quite ineffective and meaningless.

Thirdly, the broadcasters could use their dominant position in the proposed organization to extract economic surplus from independent programme originators. This surplus or pure profit would be as a result of collusive agreements against the independent programmers. Clearly the incentive exists because of the broadcasters' "bottom-line" concern, and, in particular, since the independents are a threat to the broadcasters' own programme-originating operations. Finally, the development of quality programming would be at the discretion of the broadcasters. Given the fact that the cable operators are involved in all activities of the supply network, they would find themselves in the position of producing quality programmes that would first have to be offered to their competitors. Manifestly, this would create disincentives for the development of quality Canadian programmes.

Proposals from the Exhibition-Specific Firms

HBO, LAMB, and Showtime are potentially the major exhibition-specific undertakings. HBO and Showtime have been successful with pay-TV in the United States. They have been able to satisfy subscriber demand, in terms of quantity and quality, at a monthly fee, which has facilitated rapid growth in demand. Clearly the experience in acquiring and packaging pay-TV programmes would benefit Canadian consumers. The reduction in "learning costs" associated with providing new services should be translated into relatively lower subscription prices.

HBO and Showtime are presently charging a monthly flat fee in the United States and would likely implement this method if they are licensed to exhibit the service in Canada. LAMB has not indicated the method of payment it would initiate for its proposed C-channel. This channel, it feels, should be allocated to it on a national basis in prime time for three to four hours per night, seven days a week.

In the United States, films are usually shown on pay-TV after they have been run in the theatres, and by over-the-air broadcasters. Showtime proposes that this practice also be applied in Canada. This would benefit domestic film producers because they would have a dual source of television revenues. Revenue for Canadian productions would be generated from the initial sale to the television exhibitors as well as to the broadcasters. The additional revenue would enhance employment opportunities for Canadian writers, actors, directors, and technicians, while simultaneously creating the ability for originators to improve product quality. However, it is not at all obvious that Canadian viewers benefit from the proposed timing of feature film showing, that is, theatre, over-the-air television and, lastly, auxiliary subscription television. It is claimed that a subscription market exists for feature films on television, even after individuals have had the opportunity to see them from over-the-air signals. If this is true, then it appears that the viewing order is independent of the revenues generated. Clearly, a film first shown on subscription television would not dissipate the audience who view the film by over-the-air means. Although there may be benefits that the exhibition-specific firms can generate through competition, these structural gains must also be viewed in conjunction with their conduct concerning corporate pricing, purchasing, and packaging policies.

The Concerns of the CRTC

The CRTC has been considering proposals on a case-by-case basis and has been issuing public statements on pay-TV since October 1972. These statements have dealt with many issues including Canadian content and the need for a single national entity to provide pay-TV.

Canadian content rules loom as an important consideration for the CRTC. Proposals made to the CRTC have specified Canadian content rules ranging from 15 to 85 per cent.[13] In its 1978 report, it seemed very likely that Canadian content rules would be adopted to meet the specifics of these auxiliary services and that it might include an obligation on the part of the exhibitors to present Canadian programming over a certain time period, including prime-time viewing hours.[14] In the July 1980 Therrien report and in its "Call for Applications for Pay Television Service" in April 1981, the CRTC seems to have adopted a different approach, placing less emphasis on the percentage of exhibition time alone and giving added weight to other factors such as the percentage of Canadian programmes acquired and of gross revenues spent on the acquisition of Canadian programmes.[15]

The CRTC also envisaged a single national entity that would be a privately owned company, charged with providing pay-TV on a national basis. This brokerage function, it was claimed, should be a monopoly because of the benefits of physical and financial resource consolidation to underwrite, acquire, and sell Canadian programmes, and to purchase American programmes. The national network would also be in the most advantageous position to enter into contractual arrangements with the carriers and exhibitors. However, in the Therrien report and in the CRTC's "Call for Applications," this position has changed dramatically.

There is no reason to believe that the role of "middle man" necessitates the formation of a monopoly. Indeed, in other industries, notably financial intermediation, there is a myriad of investment advisers, investment and chartered banks, trust companies, equity market dealers, commodity traders, and so on. There do not appear to be technological or organizational economies in the brokerage business. In addition, there has not been any empirical substantiation for the case of a single network. Finally, the recommended organizational form potentially sows the seeds of its own destruction. This argument follows from the stipulation that although the company will be privately owned, "it should also be possible in a private incorporation to ensure that there are representatives on the Board reflecting the views of those contributing and involved in the development of a new national pay-television service."[16] The problem with the latter statement, besides its vagueness, is that it is not possible to ensure that particular views are heard on the board of directors unless, of course, government dictates the board's composition, which in itself defeats the purpose of a privately owned organization. In addition, if non-market forces are utilized to ensure that distinct views are heard, there is the real danger that political elements may dominate.

A Competitive Structure for Subscription Television

Competition would be beneficial to viewers, and Canadians in general, in spite of the protectionist claims of many of the parties involved in the supply of television services. We can recall that broadcasters were against the licensing of cable television because it was felt that cable would be a threat to the broadcasters' revenue stream. However, the evidence seems to show that cable television's revenue-increasing effects are much greater than their revenue-decreasing effects.[17] The result has been an increase in advertising rates and profits for the broadcasters. Cable television is actually a "complementary" commodity, in terms of revenue generation, to broadcasting. Although television broadcasters lose advertising revenue through audience variation, the fact that total audience size increases and similar viewers tend to cluster around similar programmes (audience segmentation) causes advertising revenues to increase. It can be argued, therefore, that competitively supplied subscription television would positively contribute to the profitability of existing cable and broadcasting undertakings.

Is monopoly of subscription television services beneficial to Canadians? Monopolization of carriage and exhibition is not warranted by either the technology or the existence of organizational economies. Carriage can be conducted by over-the-air broadcasting, MATV, microwave, satellite, cable, or any combination of these delivery systems. This does not mean, though, that vertical integration is detrimental to Canadian welfare. The financing of quality programmes is facilitated, an improved co-ordination of exhibition with programme development is achieved, and there is a guarantee of access to potential viewers. It must be pointed out, though, that unless there is sufficient competition at each level, production, exhibition, and (especially) carriage-vertical integration may precipitate complete monopoly power of all three activities. For example, without competition in carriage, there may not be access to independent exhibitors, and without competition in exhibition, the cable licensees may, through predatory conduct, foreclose lucrative markets to independent programmers.

There is another problem with carriage and exhibition monopolies with respect to programme purchasing. There would only be a sole purchaser of television programmes. This buying or monopsony power would generate supra-competitive profits for the exhibitor-carrier at the expense of the independent programme originators. This in turn would dampen employment opportunities for originators and hinder the development of quality programmes.

In a market organization, prices are the signals by which individuals decide whether or not to undertake transactions. As for commodities in general, the method of pricing subscription television services is equally important. Three price variations have been advocated: flat, per channel, and per programme (we can also envision, for example, fees tied to time, and distance over which the signal has been transmitted). Flat fees are the current mode of payment for existing cable subscribers. Under this system, individuals are able to receive a set of channels with unlimited viewing, and so the only choice, which requires payment, is whether or not to subscribe to the network.

Pricing of cable television services is similar to the method used for local telephone services, and it suffers from the same inefficiencies. First, flat-fee pricing does not permit the consumer to self-select the television package best suited to individual tastes and budget. Secondly, charging a price, independent of usage, is not conducive to determining efficient carriage capacity. In any network, peak users should be charged more than off-peak consumers because to serve the former entails capacity and operating costs, while the latter group only involves operating costs. Obviously, charging a flat fee ignores, or rather exacerbates, capacity utilization problems. These arguments should not be construed as rejecting any form of access charges. On the contrary, service pricing should be based on an access charge and usage. The latter depends on various quantity dimensions, such as number of programmes and viewing hours.

The two remaining pricing methods have been related to usage on a per-channel and per-programme basis. Pay per channel allows the viewer the choice among channels at a fixed fee. Subscriber choice has been expanded, relative to the cable services, but is still quite limited because of the large bundle of programmes (i.e., channels) that must be selected by any one individual. This scheme necessitates the introduction of metering devices and descrambling units in order for the supplier to exclude individuals purchasing cable services from pirating auxiliary services and to bill auxiliary customers. The technology for both types of equipment already exists, notably Bell Canada's "black box," and the associated costs would not render pay per channel a losing proposition relative to flat-rate pricing. Bell Canada recently developed a terminal that can unscramble the pay signal and record the number of hours watched. This device would cost in the neighbourhood of $100.00 and there would be a monthly charge of $1.50 for the maintenance of the black box. However, pay per programme is even more efficient than pay per channel as the former involves the relevant object of consumer choice, that is, viewing time.

Moreover, because the black box can be geared to viewing time, the metering (and descrambling) costs are identical for pay per programme and pay per channel.

Competitive bidding for programming would generate larger returns for independent Canadian producers, enabling them to develop an improved product, while at the same time ensuring that no excess profits are retained by the exhibitors or carriers, in particular the network broadcasters or the cable firms. The revenue generated from these auxiliary services would be available for developing independent producing studios. There are presently insufficient production facilities that are not owned and controlled by the network broadcasters. The broadcasters, especially the CBC with its use of public funds, constructed their own production facilities, and in turn, through monopsony power, inhibited the growth of an independent production industry. The result has been that Canadian programmes, originated by both the networks and independents, have not been of sufficient quality to satisfy demand.

The quality problem is also at the heart of the purchase price differential between Canadian and foreign (especially American) programmes. Because of poor quality, there is limited demand for the products of Canadian originators, and consequently each customer's cost contribution must be proportionately greater than for programmes with mass appeal. It is often claimed that the price differential is the result of market size. However, poor quality causes small market size, which in turn means a higher price. Obviously, just as American originations are demanded in Canada, Canadian programmes could be purchased for viewing in the United States. Quality programmes are in demand all over the world.

Government policy, in response to the quality dilemma, has imposed quantity restraints in the form of Canadian content quotas. This policy is incorrect for two reasons. First, it has focused on the quantity rather than the quality aspects. In essence the government has not directed itself to the proper dimension. The result has been a charade, whereby exhibitors satisfy Canadian content constraints through news, sports, and game shows. Secondly, the "rules" have removed the forces of competition that provide the impetus for quality improvement. This has led to virtual stagnation of Canadian productions.

Government, rather than imposing quantity restrictions, should provide incentives for individuals to finance, develop, and purchase Canadian programmes. This policy could involve the introduction of tax credits, deferrals and deductions, subsidies, and low-interest loans. For example, as with the feature film industry, a 10 per cent tax write-off on financial investments could be implemented. With respect to films, for every $1.70 the Canadian government lost in taxes, because of the write-offs, $100.00 was generated in film activity.[18]

With the increase in activity comes improved quality and the ability to compete in world markets. In addition, independent producers could be granted investment tax credits, accelerated depreciation, and low-interest loans, while corporations advertising on Canadian programmes could be granted tax deductions or deferrals and simultaneously pay extra taxes for advertising on foreign programmes. The latter policy would help to increase advertising revenues for the independent producers, which in Canada are woefully lacking. Comparison of per capita television revenue (in 1977 Canadian dollars) for advertising is $46.00 for the United States, $45.00 for Australia, and $18.60 for Canada.[19]

Finally, these tax policies will not, on balance, increase the government deficit and may generate a surplus from these activities for two reasons. First, with the development of an independent television production industry, the government will gain corporate income and sales tax revenues. In addition, the increased employment of writers, actors, directors, producers, and technicians will be a source of personal income tax revenues (and there are also the secondary effects arising from sales taxes on consumption expenditures). Secondly, the government would be able to decrease its expenditures on producing Canadian programmes (through the CBC) as a viable private-sector industry begins to flourish.

Over the years there have been other proposals to encourage the development of independent Canadian programmes, two of which are taxing cable operators, and taxing subscribers to pay-TV (i.e., auxiliary services). First, by taxing cable operators, the effect is that part of the incidence is passed on to cable subscribers and the quantity of cable services diminishes. No incentive has been created to actually use Canadian programmes. In addition, this policy discriminates against cable as opposed to other exhibitors and carriers, and to the extent that cable firms are (or will be) involved in programme origination, the tax discourages this development. Secondly, by taxing pay-TV subscribers, the major incidence of this tax will fall on the suppliers, since the price elasticity of demand is relatively greater than for basic cable services. Once again, through the vertically integrated structure, Canadian programme origination is hampered and simultaneously there is no incentive to purchase Canadian productions. In this way, competitively supplied pay-TV, with government tax policies, will bring about quality Canadian programmes and a new outlet to increase quantity. Similarly, under competition, exhibitors and carriers will be able to expand their service offerings by supplying packages directly tailored to different audiences with diverse tastes and budgets.

Recently, the case has been made for greater vertical integration in the broadcasting industry.[20] Proposals have been advanced whereby programming will be competitive while government would have control over exhibition and carriage (the Griffith report). There are no reasons for the government to monopolize Canadian television exhibition and carriage. The Ouimet and Clyne reports have suggested a separation of content (programming and exhibition) from carriage. Separation has been defined as either the establishment of separate corporate entities (but with overlapping ownership and control) or the creation of "arm's-length" subsidiaries.

The creation of distinct legal bodies with their own accounting records is not a solution to the concerns over vertical integration. As long as ownership and, more importantly, corporate control are in the hands of the same individuals, economic disintegration has not occurred. Legal and accounting, but not economic, separation appear to be political solutions to an undefined problem. There are many benefits to vertical integration (for example, facilitating innovation) that can be found in telecommunications carriage and manufacturing and in the metal industries. Tempering vertical integration in television services is accomplished by sufficient competition in the programming, exhibiting, and carriage activities. This is clearly not accomplished by artificial separations or by government-monopolizing enterprises. The proper role for the government, in this instance, is the enforcement of "adequate" Canadian competition policy.

Economic Impact on Selected Related Industries

Auxiliary television services will have an impact on many aspects of the communications and entertainment industries, especially telecommunications, manufacturing, and film production.

Telecommunications and Manufacturing

With regard to carriage, the telephone companies see their role in the provision of return channel capability, the recording and collecting of viewing information, the billing of subscribers, and providing customer access control to premium programmes. Therefore the common carriers would compete in providing terminal products that are needed to deliver pay-TV services. Although an insignificant portion of telephone company revenues, leasing or selling and repairing terminal products do generate revenues and increase employment. Moreover, we expect that as time passes, other firms engaged in producing electronic terminal products will offer metering and descrambling devices to subscribers.

On the manufacturing side, Bell-Northern Research has devised a pay-TV support system that would make use of the existing cable and telephone networks. This system would provide two benefits. First, the flexibility of the system would allow additional channels without additional equipment. This innovation would generate increased profits to the carriers and exhibitors, since there would be an increase in channel capacity at very low marginal costs. Secondly, the system offers a great deal of security against "black market" terminals. Carriers would have the ability to exclude individuals who are not subscribers to the network. Information on viewer tastes would be readily available through the support system, which would lead to an improved matching among programmes, viewer preferences, and budgets. As a consequence, revenues would be generated through increased audience size and longer viewing hours.

Existing geostationary satellites (the Anik series) and the development and implementation of direct broadcast satellites (DBSs) will provide significant improvements for the carriage of auxiliary services. This is especially true for DBSs for two reasons. First, there is a general lack of capacity on the Anik series. Secondly, unlike geostationary satellites, which provide point-to-point service and then need signals to be delivered by cable or by low-power broadcast transmitters, the DBSs can provide signals direct to homes. In addition, their higher power permits the use of smaller (60 cm to 1 m in diameter) and less expensive receiving stations relative to the Anik series (for example, the Anik C require dishes of 3 m to 4.5 m). New dishes have been introduced in the United States for under $5000 that have the capacity to receive 60 channels. Auxiliary subscription television can utilize part of the DBSs' capacity and therefore play a part in generating sufficient revenues to make the introduction of DBSs economically feasible. In turn these satellites will help to create the needed competition for carriage activities that will ensure both sufficient channel accessibility for exhibitors and low rates for subscribers. For example, hotels such as the Holiday Inn offer satellite-carried programmes to their guests to provide them with varied viewing selections.[21]

The increased demand for satellite use would create additional revenue, which would result in greater employment opportunities for Canadian engineers, scientists, and technicians. In addition, to meet this demand, educational curricula have recently been developed to train students in all phases of the technology, including electronics.[22] Concurrently an epidemic has arisen in Canada over the installation of unauthorized television receive-only (TVRO) earth stations. This has been prompted by the lack of quality programming available in some areas of Canada. The individuals concerned are willing to break the law because they have no alternative means of viewing the programmes they demand. Clearly, this is an untenable situation because signals of American stations received over the air do not have private property rights, while all satellite signals do. Thus installing these TVROs breaks the individual excluding barrier that distinguishes public from private property rights and allows the viewers to free ride on the satellite signals.

There are two polar solutions. First, payment can be demanded from the individuals receiving the satellite signals. If this solution is adopted, American firms would be competing for advertising dollars, subscription revenues, and exhibition rights. The major concerns are that widespread demand for American satellite services would impair the development of Canadian satellite and pay-TV services. Moreover, independent television originators may never be able to establish themselves. At the other extreme, the second solution is to declare that receiving any American satellite signal is illegal. Given the benefits of competition, it is not efficient (nor for that matter equitable to remote areas) to ban all American satellite signals. A possible compromise consistent with the principles of competition is that in regions where the American satellite services are the only ones, they could be defined as primary services and priced accordingly. However, in areas where the American satellites provide competition to Canadian cable, over-the-air broadcast, microwave, and satellite services, the former can be defined as auxiliary or vertical services and subscribers must pay a premium (e.g., in the form of a tax) for their reception. This will give Canadian entrepreneurs a fighting chance. In conjunction with the higher price, the development of quality Canadian subscription television, because of the ability to produce, exhibit, and carry programmes demanded by audiences of various sizes (for a price), will lead over time to a decrease in demand for American satellite signals.

Film Origination

The National Film Board (NFB), established in 1939, is the largest Canadian film producer, with a budget of over $35 million. The NFB's role is to produce government-sponsored and other publicly funded films. The other government group involved in film production is the Canadian Film Development Corporation (CFDC). This latter corporation, established in 1968, invests in the production of films by the private sector. The CFDC's role is to expand private feature film production through loans and bridge financing.

Until recently there was very little demand for Canadian feature films produced by independents because the exhibitors were "tied" to British and American studios and because of the rigid in-house policies of the NFB and network broadcasters. However, with tax incentives and joint ventures, Canadian originations have increased tenfold in three years. This has created many employment opportunities for writers, directors, actors, musicians, and technicians.

The auxiliary television services will be a boon to the Canadian film industry. Exhibitors will be demanding the quality Canadian films that are presently being developed in this burgeoning industry. In addition, the CFDC could be used as the vehicle to undertake financing of privately produced films that could be prepared for the pay-TV market. The NFB may also find pay-TV exhibitors an important outlet for its work. The NFB already has an excellent international reputation, and the potential new source of demand for the Board's films would enable it to improve quality even more.

Advertising

It has not been decided by the CRTC whether or not to permit advertising on pay-TV. In the United States, advertisers serve small but significant target markets via messages on the auxiliary services. Their advertising expenditures have made special programmes available to consumers at a lower price, thereby increasing the number of subscribers. This lower price would also be translated into larger subscription revenues for the exhibitors. This arises, not solely from the larger number of viewers, but because the demand for the auxiliary services will probably be quite price elastic, and so any proportional decrease in price translates into a relatively larger increase in programmes watched per individual. The advertiser would benefit because auxiliary services would provide specific target markets, allowing a finer tuning to the consumer. This targeting would be rather easily monitored given Bell-Northern's support system, which would provide advertisers with data permitting them to determine which programmes attract the audience best suited to their product.

Conclusion

This essay has brought out the potential impact of pay-TV on the Canadian communications industry. It is quite evident that if properly carried out, pay-TV will bring many benefits to Canadians. These benefits will involve the development of quality programming tailored to the tastes of Canadian viewers. In addition, within a competitive market structure and with the appropriate tax incentives, independent television originators will be able to receive an adequate return and thereby create employment opportunities for the multiplicity of individuals needed to undertake quality productions. Exhibitors and carriers will also reap positive returns. Moreover, not only will horizontal competition encourage allocative efficiency, but it will also temper the negative effects of vertical integration and allow the minor technological and major organizational economies to surface. Finally, the auxiliary services will generate revenues for the common carriers and other producers of metering and descrambling devices, for manufacturers of satellites and receiving stations, for independent film producers, and advertisers.

It appears that there should be an expeditious introduction of auxiliary subscription television services. This conclusion is all the more pressing because of the enormous North American market. The longer Canadians wait, the greater will be the retardation of an independent television programming industry and the larger will be the revenues that flow south of the border.

Notes

* Copyright © by Jeffrey I. Bernstein, 1981. This paper was written prior to the 1981 pay-TV licensing hearings. Although the materials used to illustrate the different models of market structure come from earlier hearings, there were no new models introduced in the September 1981 licensing hearings.

[1] These terms are used in the same manner as defined in Canadian Radio-television and Telecommunications Commission, *Canadian Broadcasting and Telecommunications: Past Experience, Future Options* (Ottawa: Minister of Supply and Services Canada, 1980), p. 104.

[2] Statistics Canada, *Cable Television, 1979* (Ottawa: Minister of Supply and Services Canada, 1980).

[3] Steven Kelman, "CRTC Ruling Good News for Cable Firms," *Financial Times of Canada* (27 April 1981), p. 48.

[4] "400 MHz," *Cable Communications* 46 (July 1980), p. 5.

[5] For a good discussion of the history of the TCTS, refer to E.B. Ogle, *Long Distance Please: The Story of the TransCanada Telephone System* (Toronto: Collins, 1979).

[6] See Telecom Decision CRTC 79–11 CNCP Telecommunications Interconnection with Bell Canada, Ottawa (17 May 1979).

[7] Peat Marwick, Phase Two Report, *A Review of the TCTS*, 1979, and *Response to CRTC on Behalf of CNT and CPT*, January 1979.

[8] For these figures, consult Statistics Canada, *Radio and Television Broadcasting 1979* (Ottawa: Minister of Supply and Services Canada, 1980); Canadian Radio-television and Telecommunications Commission, *Special Report on Broadcasting in Canada, 1968–1978*, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1979); and Statistics Canada, *Cable Television, 1979* (Ottawa: Minister of Supply and Services Canada, 1980).

[9] "Pay TV Is Alive and Well in Saskatchewan," *Cable Communications* 46 (June 1980), p. 20.

[10] Canadian Radio-television and Telecommunications Commission, Committee on Extension of Service in Northern and Remote Communities, *The 1980s: A Decade of Diversity: Broadcasting, Satellites, and Pay-TV* (Ottawa: Minister of Supply and Services Canada, 1980).

[11] See Richard A. Posner, "Theories of Economic Regulation," *Bell Journal of Economics and Management Science* 5 (Autumn 1974): 335–58.

[12] The proposal by the Canadian Broadcasting Corporation (CBC) is similar to the CAB, except that two separate organizations should be established, one for each of Canada's official languages. In addition, 5% of gross revenues would go to developing Canadian programming. The essential monopoly position for the broadcaster in producing pay-TV would be maintained. See CRTC, *The 1980s: A Decade of Diversity*, pp. 69–70.

[13] Canadian Radio-television and Telecommunications Commission, *Report on Pay-Television* (Ottawa: Minister of Supply and Services Canada, 1978), p. 35.

[14] *Ibid.*, p. 51.

[15] CRTC, *The 1980s: A Decade of Diversity*, p. 75, and Canadian Radio-television and Telecommunications Commission, "Call for Applications for Pay Television Service," Ottawa, 21 April 1981, p. 11.

[16] CRTC, *Report on Pay-Television*, p. 40.

[17] See S.J. Liebowitz, "The Impact of Cable Television on Television Broadcasters," (London: University of Western Ontario, 1980).

[18] *Globe and Mail* (13 November 1979), p. 35.

[19] CRTC, *The 1980s: A Decade of Diversity*, p. 61.

[20] See Stuart Griffith, "Alternatives for Canadian Television," in Ontario, Royal Commission on Violence in the Communications Industry, *Report*, vol. 7, *The Media Industries: From Here to Where?* (Toronto: Ministry of Government Services, 1977), pp. 209–51; J.A. Ouimet, "Rationalizing Canadian Telecommunications," study prepared for the federal Department of Communications (Ottawa, 1978); and Department of Communications, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, *Telecommunications and Canada* (Ottawa: Minister of Supply and Services Canada, 1979).

[21] "Holiday Inns Order Satellite Earth Station Equipment." *Cable Communications* 45 (August 1979), p. 10.

[22] "College Program Responds to Demand for Trained Cable TV Personnel," *Cable Communications* 46 (May 1980), p. 32.

Pay-Triation — Fulfilling a Canadian Promise

7

by
Honourable David MacDonald
and
Fred Rumsey

Myopia . . .	a condition of the eye in which parallel rays are focused in front of the retina, objects being seen distinctly only when near to the eye; hence
Technopia canadensis . . .	a condition of intense focus on hardware and new technologies causing an inability to see long-range effects.

What Do Canadians Want From Pay-TV?

Pay-TV is one of those once-in-a-decade opportunities to significantly change reality. But how do we overcome *technopia canadensis*? It has a lengthy history in the Canadian body politic. For example, the Canadian record in communications technology has been consistently one of world leadership in the research, development, and engineering of new delivery modes for television — and just as consistently, of failure to adequately consider and plan for what those systems would carry. It happened in the remarkable effort that brought the national television system to 98 per cent of our citizens, and again in the construction of the world's most extensive cable network, and again as Canada became the first country to have in operation a domestic communications satellite, and again with our pioneering work in direct broadcast satellites.

However, it is hard not to conclude that when it comes to Canadian television, the whole is a good deal *less* than the sum of the parts. With all that we have going for us in film and video, 20 per cent might seem a reasonable figure for the foreign content of Canadian television viewing. Yet the real figure is over 80 per cent foreign for prime-time entertainment.

Canadian initiatives — *Canadian* hardware — *foreign* content — it is a recurring saga, but we seem unwilling to act on the lessons of our own experience. And this is only one obvious symptom of our willingness to allow new technologies and systems without consideration to the underlying values at stake or to whether they give us, as

Canadians, maximum benefit without major adaptation. If economic efficiency were the sole concern, adoption of foreign ways, holus bolus, might work in our favour. But technology is not socially or culturally neutral, especially in communications and information activities. We are in a constant state of adjustment to technological change, whether in the home or the work-place, from changing traditions in a televised House of Commons to acrimonious disputes over automation of news presses.

Characteristic of our relationship to technology is a lack of planning until its introduction is a *fait accompli*. It seems, too, that benefits are mostly enjoyed at the private level (be they corporate profits or a new gadget for the home), while negative effects are left to the public arena to redress. With pay-TV the most imminent of the new mass communications technologies, Canadians have an excellent opportunity to assert a different relationship, based on twin tenets:

- We have a right to participate in decisions that have consequences for us or for future generations.
- The public sector is entitled to insist that the benefits to Canadians as a whole should take precedence over private benefits from a new technology.

Not everyone has been blind to pay-TV as an opportunity to realize certain goals. It is, however, private rather than public goals that dominate the discussion — new revenues for cable operators, for example, or jobs for film makers. Similarly, discussion of pay-TV's potential for harm has largely been in terms of private disadvantage, such as reduced audiences for broadcasters or movie houses. Policy cannot ignore private interests and goals; in fact, the achievement of fair balance among them must be a major preoccupation. Yet they should not be the starting point. If there are opportunities for Canada in the introduction of pay-TV, they require a framework of public goals rooted in the public interest. The scope for achievement of private goals should then be maximized, to the limits of that overriding framework.

The impact of pay-TV's introduction to Canada is not predetermined. Basic decisions face us — regulatory jurisdiction, carrier involvement, hardware financing, nature of the distributor or packager, local input, Canadian and regional content, apportionment of revenues and profits, and so on. *Our* choices here can decide to what extent pay-TV will help us as individuals, as communities, as a nation. It does not have to be a case of figuring out what choices are left to us once others have made the basic decisions. This may not be the conventional wisdom, and that, above all, is the purpose of this article. This country can design a system of pay-TV that holds substantial benefit for Canadians, if we choose to assert a new relationship between us and technology.

There are really two decision-making paths we can follow, the planned or the pragmatic. That choice in itself may hold the most far-reaching implications. Each issue could be resolved more or less on its own. The jurisdictional issue would be a federal-provincial compromise, based on relative priorities attached to control of pay-TV and on respective bargaining strengths. The issue of how to structure the programming entity would be treated as a "least offence" scenario, satisfying as much as possible the sometimes mutually exclusive claims of private broadcasters, the CBC, producers, and cable. And so on for each separate issue. The choice between planned or pragmatic decision making is clear if we ask ourselves whether what we want is more of what we already have. Are we satisfied with another channel whose major difference from a CBS or CTV is fewer commercials and a bill of $120 to $150 a year for the privilege? That is the outcome we face from a pragmatic and unco-ordinated introduction of pay-TV. Any benefits to Canada as a whole will be incidental, and viewers will see more from the same Hollywood industry that made the terms "idiot box" and "boob tube" synonymous with television.

The alternative is a process that is comprehensive. The comprehensiveness comes from the *prior* formulation of public goals that are a touchstone at every stage of decision making and in every forum for negotiation. This framework evolves from asking one question: "What do we as Canadians want from pay-TV?" The path of planned rather than pragmatic policy decisions will result in a different system of pay-TV in Canada, more closely approximating what we want and less predetermined by impersonal or external forces of economics and technology. Questions from jurisdiction to the structure of the programming entity would be resolved within the *same* framework of public goals. If developing our video programme industry is one of the results we want from pay-TV, then it is more likely to come about when decisions on jurisdiction and system organization are both made to that end. A comprehensive approach would be further integrated with the full range of policy making, from economic to cultural. It is important that pay-TV be understood as only one opportunity out of thousands that exist for furthering the public interest. We would not contemplate harnessing pay-TV revenues to the provision of better housing, for example. More practically, we should not expect pay-TV to satisfy every demand on the television system. In the context of other policy instruments, the benefits sought from pay-TV can be relatively few, better defined, and appropriate to the medium.

The Canadian public collectively would ask quite a lot from an "ideal" television schedule. To provide direction for a comprehensive approach to pay-TV, and indeed for all television, we offer a Charter of Television Rights to meet the needs of the Canadian public.

The Canadian Public's Charter of Television Rights

1. Canadians deserve an entertainment service that provides choice, variety, creativity, quality, and diversity of source.
2. Canadians deserve an informational service that distinguishes between fact and editorial; that is not controlled from one source; that provides balance among local, regional, national, and international coverage; that informs them on all fields of human endeavour of significance to their lives.
3. Canadians deserve television that is free from partisan political influence or manipulation by any vested interest and that is not reliant on a narrow base of financial support.
4. Canadians deserve television that is safeguarded against foreign control.
5. Canadians deserve the experience of television that provides a regular outlet for emotional release that is beneficial rather than frustrating.
6. Canadians deserve television that contributes to their sense of belonging and identity with their various communities of interest, language, heritage, and geography, from local to national; and to their ability to appreciate, learn from, and speak to the other communities with which they share their neighbourhoods, provinces, country, and planet.
7. Canadians deserve television that contributes to their spiritual, ethical, cultural, political, social, and economic well-being and development.
8. Canadians deserve a television system that is open to the widest expression of video art and craftsmanship, and that assures creative freedom for all who contribute to its schedules.
9. Canadians deserve access to television programming in the language of their choice.
10. Canadians individually and collectively deserve a voice in the programming that reaches their homes and in the direction of the technologies involved.

Pay-TV in the Canadian Context

From this general framework covering all Canadian television, specific public goals for pay-TV can be developed. Some would be applicable across the board to all elements of television. There are others where pay-TV might be considered to carry a prime responsibility. Three features of pay-TV help us to sort out what we should expect from it versus what is better achieved by other elements of Canadian television.

The first is that it is an entertainment service. Accordingly, pay-TV is not primarily an appropriate instrument for goals related to information content. Information quality would, however, be a policy concern for videotex introduction.

The second characteristic is mass audience. What mass audience programming means is that content will be chosen that appeals to a theoretical majority audience, or at least a substantial minority. Satisfaction of true minority needs and interests is accordingly a less appropriate goal for pay-TV than for subscription, publicly funded, or local television services. Mass audience potential is more valuable to goals that depend on large numbers of Canadians sharing the same media experience. In other words, pay-TV is suited more to collective than individual development — Canadian identity and interregional understanding being two such goals from a public interest perspective.

Pay-TV's third major attribute is high revenues. It is significant that these are new revenues to television, as well, not diverted from other elements of the system. Probably stating the obvious, but worth the emphasis, we should expect pay-TV to be concerned with goals that require large financial resources. In the production of Canadian video with budgets comparable to those from the Hollywood multinationals, our television system has so far done poorly. Here, for example, pay-TV might carry a prime responsibility to realize a long-standing goal of public policy.[1]

We have begun to distinguish pay-TV's role in meeting public objectives from the system as a whole. In answer to the starting question, "What do we as Canadians want from pay-TV?" it is possible to suggest some specific criteria to provide a public interest framework for resolving the issues on the nature of pay-TV in Canada.

Entertainment Role

To provide an entertainment service of choice, variety, creativity, quality, and diversity of source. Of course, all commercial television depends on the popularity of its entertainment offerings. How can pay-TV be differentiated? The advantage of examining pay-TV in the context of the entire television system is apparent here. It is not necessary to demand that it correct all weaknesses and omissions in the television entertainment landscape. By concentrating pay-TV on certain needs, the rest of the system is freed to give more attention to other improvements. We must remain aware of not only the implications of pay-TV for Canadian society, but also the resulting chain reaction throughout our television system. Even without a single minute of science programming, for example, pay-TV could contribute to its development by allowing the CBC to divert funding from high-budget entertainment spectaculars. Moreover, in terms of the specific criteria, pay-TV will automatically increase channel *choice* for entertainment.

Whether this translates into greater *variety*, however, is a policy decision. The economic features of pay-TV suggest limited potential for a wide range of formats. In this instance, it seems sensible to allow pay-TV to focus on the relatively few types of entertainment programming appropriate to its high budget, mass audience nature, such as performance specials and feature films. This is not to concede that Canadian pay-TV would mimic American systems in content. The content should be diverse, but realistically there is limited demand at present for many ways of packaging that content. Attention would shift to other elements in the television system to expand true variety for viewers, which if successful would be adopted by pay-TV.

Similar considerations would apply to *creativity*. Obviously pay-TV will not succeed without imaginative programming. The greater the economic stakes, however, the less likely it will produce creative television in the sense of high-risk, innovative, or experimental television. This is a far more probable role for the non-profit television sector. *Quality*, on the other hand, is related to available budgets, not inextricably, but particularly so when it is consistent quality of mass audience appeal that is required. More than any other element of the television system, pay-TV should carry a prime responsibility for quality entertainment.

Finally, there is the criterion of *diversity of source*. This may be interpreted geographically — to reach beyond the New York-Hollywood-Toronto-Montreal iron quadrant of Canadian television entertainment. Or it can be interpreted organizationally — to offer schedules that are more than the sum of in-house programming by Canadian broadcasters. On either count, our television system has performed miserably. Should the remedy include pay-TV? Yes and increasingly yes. Diversifying organizationally the sources of entertainment programmes would be difficult without access by new entrants to pay-TV's premium revenues. A new system is also the most opportune time for restructuring and altering roles. Pay-TV can play a major role here. Diversifying the sources geographically is dependent on the ability of other centres — within Canada and around the world — to produce mass audience entertainment programmes. A mature film industry takes time to evolve. At a certain point, though, it may stagnate industrially without access to the revenues and audiences of a pay-TV system. Other elements of Canadian television may be more important to the initial growth of new production centres. Pay-TV's role should grow over time as these centres mature.

Identity

To provide television that contributes to Canadians' sense of belonging and identity with their various communities of interest, language, heritage, and geography, from local to national. The development of identity is one of the collective goals, referred to above, that are appropriate to a mass audience service.

Identity is a difficult implication to quantify or evaluate. For any single programme, it is like assessing the contribution that a grain of sand makes to a beach or one brick to a house. A network's annual viewing schedule is really the smallest practical aggregation for making such judgements. We can ask at that level that there be entertainment content that enhances Canadians' feel for shared events and themes of our history, that highlights common problems and characteristics of Canadian life today, or that evinces similar responses to future visions and goals for the nation as a whole.

However, there are economic constraints on pay-TV that realistically preclude it from enhancing every level of identity that Canadians hold. Essentially, the question is one of numbers. The fewer persons who are part of a given community of identity, the less the potential revenue base, and the more that other elements of the television system must carry responsibility. It is only the larger communities of identity we should expect a pay-TV system to promote through programming content that re-enforces their common sense of history, life, and future. National identity and regional identity, in the sense of southern Canada's five main regions, are the most to which pay-TV can be expected to contribute. Smaller communities of identity, from province to neighbourhood, must remain a responsibility of the regular broadcasters, educational networks, and cable community channels, or other media where the costs of production are less than in television. Even the inclusion of regional identity is problematic, economically that is.

What of the non-geographic communities? Here, again, potential audience size is a determining factor. In terms of language, pay-TV must definitely serve the French- and English-speaking communities. The other languages, from ethnic to native, should be served by other elements of the system. There are more tailored media and organizations that exist to sustain and enhance the multicultural heritage of Canadians, as there are for the various communities of interest. A major need does not exist in this regard that pay-TV must address. It is the negative or stereotyped presentation of certain groups, or their virtual exclusion from programming, where pay-TV has a potential for harmful impact.

For communities of interest — which run the gamut of occupation, hobby, life-style, class, politics, age, and physical attributes — the criss-cross, overlapping identities that Canadians hold make delineation virtually impossible. Criteria of inclusion rather than exclusion may be appropriate here. Pay-TV should not be judged on how well it contributes to specific groups of interest within society. It should be held to account for its portrayal of Canadian society as a whole. It must not, to simplify, contribute only to the identity of the white, middle-class male.

Interchange

To provide television that contributes . . . to Canadians' ability to appreciate, learn from, and speak to the other communities with which they share their neighbourhoods, provinces, country, and planet. This goal, of interchange and dialogue, is another that is more easily realized through a mass audience medium. Pay-TV is best suited for such exchange of nation-wide or international scope. The high-revenue need of the system is less and less likely to be met as the potential audience narrows, so other elements of television and other media should be relied upon for social and cultural communication within a province or locale.

At the national level, the rationale for attaching such priority to interregional exchange is both positive and negative. On one hand, national institutions and processes become unworkable in a situation of great diversity, not because people hold divergent and contradictory perspectives or aspirations, but when there is little awareness and understanding of those differences. On the other hand, diversity is too often viewed as a necessary Canadian evil, a problem to be contained and managed. When diversity is seen as a positive and indeed limitless opportunity for enrichment of and throughout all our lives, the potential benefits cover the map from psychological to economic.

Interestingly, it is precisely in the entertainment industry where diversity of society yields the greatest economic pay-off. The creative heart of the industry strengthens when it can draw upon a broader range of perspectives and, resulting from the interaction among them, a deeper level of insights. And the more diverse the product, the more that it will relate to wider audiences world-wide. In a sense, to ask that pay-TV make a major contribution to interregional exchange within Canada is ultimately to strengthen its economic viability. That ceases to be a paradox once the creative opportunities arising from diversity are appreciated.

To learn from and speak to is explicitly two way. Unless one starts with an assumption of inherent superiority of one region's life and culture over the others', the fullest possible interchange depends upon an equality of flow among the parts. This means comparable production budgets and access to the national network. It is practically impossible to ensure the financing of top-quality, top-budget entertainment programmes in every region without a high-revenue mechanism such as pay-TV. As has been noted, the ability of each region to produce the consistent quality and quantity of programming needed will not emerge overnight. The implementation of pay-TV for

Canada must, however, build in a capacity to accommodate increasing regional quality productions.

Internationally, it must be admitted that our television system has performed excellently in allowing Canadians *to appreciate and learn from* the American community. It has not given us much opportunity to speak back, however, nor to develop much interchange with anywhere else in the world. Our ability to trade abroad; to better appreciate the heritage of fellow Canadians; to hold informed viewpoints on foreign, aid, immigration, tariff, environmental, energy, and defence policies; to place our experience in a global perspective — we are hampered in many ways by our impoverished level of exchange with the international community.

We are well conditioned to Hollywood entertainment styles, and perhaps even more so to mistrust programming that does not bear its imprint. A pay-TV schedule whose foreign content was largely non-American would, today, probably have fewer subscribers than the *Canada-Mongolian Review*. An incremental increase of truly international entertainment would develop Canadian tastes for a more cosmopolitan blend, and begin to realize the benefits for us from greater contact with the world. Equally important is our ability to speak to the international community through Canadian television productions. By its nature, pay-TV will stimulate programming of exportable quality. Whether these productions say anything about Canada is less certain, in view of our film industry's record. We cannot afford to sacrifice to short-term gain the potential of pay-TV as a medium of dialogue, not only among ourselves, but between Canadians and the world.

Economic Role

To provide television that contributes to Canadians' spiritual, ethical, cultural, political, social, and economic well-being and development. A contribution from pay-TV toward any of these goals would naturally be welcome. In the context of the overall television system, we have emphasized those that pay-TV is particularly suited for in view of its high-revenue, mass audience potential. The politico-cultural goals of identity and interchange provide two clear examples of pay-TV's capacity to significantly rectify public needs. Concerning our *economic well-being and development*, however, there is wide disagreement over the role of pay-TV.

A scenario of maximum possible revenues would, given today's market tastes, mean virtually total importation from the American pay-TV distributors. Economic benefits in the form of high profits would accrue to some Canadians, with a few new jobs in distribution and marketing. One modification of this scenario would redistribute excess profits to broaden the economic benefits. These include subsidized extension of television services to remote areas, programming funds for minority groups, increased budgets for public broadcasting, better financing for Canadian producers. A third option would accept less than maximum revenues in return for other direct economic benefits, primarily jobs and incomes for the Canadian production industry. This would have a further benefit in reducing the balance-of-payment outflow for foreign product. The difficult trade-off here is to determine at what point additional domestic programming will precipitate a drop in revenues greater than the income from producing that programming.

These three scenarios convey an idea of the alternatives available for realizing economic benefits from pay-TV. Even the first scenario cannot be dismissed out of hand. A few well-capitalized firms within the television system, given the right mix of incentives, is a plausible base for an intensive export strategy. And that could in the end result in more jobs and higher incomes for the Canadian production industry than even the third option. There is no obvious choice based on purely economic criteria.

Allowing one assumption about future trends in the television industry, however, does indicate a preferred approach. The assumption is that with the proliferation of distribution technologies for video — 100-plus channel capacities, discs and cassettes, fibre optics, direct broadcast satellites — the greatest growth sector of the industry will be programme production. Demand for video programmes/content/software is about to explode world-wide. The greatest economic gains will accrue to Canadians if we are able to become established as major video exporters. The catch is, with few exceptions, that successful export industries require an established domestic market (and the more complete their control at home, the better, witness Japan or Bell Canada or Hollywood). The more that pay-TV can establish a domestic market for the Canadian production industry, the greater the potential economic benefits to us. So the third option, which forgoes maximum revenues in the short run to give higher priority to providing a home market for an expanding Canadian video production industry, seems to make the most sense in economic terms.

Regarding the export market, there seems as yet no obvious solution to our schizophrenic dilemma. Without international sales, domestic revenues seem inadequate to fund enough competitively popular, quality productions. With a large export component, the compromises seem to blur anything distinctly Canadian so that the product says little to ourselves or to the world about what we have been, are, or want to be as a people. Potentially, the export market is vast — and expanding. We need those dollars. We need the international exposure for Canadian creativity. The question is, can we go one better than Marie Antoinette to have our culture and export it too? Yes, if the

British, French, Germans, Americans, and Russians, among others, are any indication. Canadian programming does not have to mean parochial themes. We are urbanized, multicultural, wired, environmentally sensitive, just to start off a lengthy list. In all that wealth of experience, there is an infinite mine of universal themes that can stand on their own merit without changing the place names and licence plates to protect the investor.

What we are experiencing as a society is shared around the world, particularly in the wealthy markets we seek. There lies the basic attraction of Canadian video outside our borders, provided it does not suffer from anaemic budgets or haphazard promotion. The fact that we may bring a different sort of humour or sense of values to those situations increases the appeal. The Canadian and American experiences arise from different dreams. Despite a continent shared and myriad developments in common, the differences manifest a sustained vitality. Sometimes only a subtle shading of perspective separates us, other times a vivid contrast in our reactions is apparent. There is so much from which to fashion a uniquely Canadian product. Although a major export push is probably essential to achieving budget parity with the Hollywood competition, a distinctively Canadian product to export is essential if we are to gain a foothold in the international market for video production.

Applying a Public Interest Framework to Pay-TV

The foregoing refinements of goals from the "Canadian Public's Charter of Television Rights," which are of special relevance to pay-TV, combined with those goals that are generally applicable across the whole television system, provide at last an answer to the master question: "What do we as Canadians want from pay-TV?" This is the public interest framework for decision making and negotiation. As a result of the introduction of pay-TV into Canada, we want the following:

- Better quality popular entertainment available on television
- Entertainment programmes from a greater diversity of sources
    - (i) in a major way from different production organizations, and
    - (ii) over time, from geographically diverse sources, regionally and internationally
- Strengthened identity among Canadians
    - (i) nationally, and
    - (ii) to some extent regionally
- Greater interchange through the television medium
    - (i) among our regions, and
    - (ii) between Canadians and the world community[2]
- Service available in English and French throughout the country

- Schedules that offer a balanced and fair portrayal of Canadian society and culture
- A major expansion of the domestic market for the Canadian video production industry
- A service free from distortion by partisan or other vested interests
- A service under full Canadian control
- Real input from the Canadian public into the service.

With this framework, specific policy questions can be resolved, perhaps not any more easily, but certainly in a more consistent manner. We shall apply this framework to several of the more contentious issues in the pay-TV debate, to outline the type of system that could emerge from a public interest perspective.

Who Controls?

It seems that at least half the debate has revolved around this one question of who should control a Canadian pay-TV network or, to be very precise, who should decide its schedule and programme content.

Our framework helps us to narrow down the choice at once. First, control must be Canadian. And, secondly, it must be *free from partisan or other vested interests*. There are many implications to the latter condition. Direct government control is out. Control by probable competitors is out, including broadcasters, movie house owners, and generally anyone in the entertainment packaging industry. Control by potential beneficiaries is also out, including film producers, cable distributors, sports franchise owners, and equipment manufacturers.

The private sector is not excluded totally, but the scope of acceptable owners, who have no other economic interests, is quite narrow. The obvious alternative, an arm's-length Crown corporation, is not completely free of partisan influence. Governments appoint the directors, and even where direct interference is avoided, there exists always an unspoken understanding of permissible limits that will influence decisions of the Crown corporation.

We should consider a third condition of the framework, that pay-TV allow *real input from the Canadian public*. Public control does not automatically mean government ownership, as long Canadian experience with credit unions and grain co-operatives shows. A corporation whose directors are elected by pay-TV subscribers is an example worth considering. Presumably directors would be geographically determined, and initial financing would be in the form of government loans. The professional staff of the network would be accountable to these elected directors.

To date we have yet to create effective means for the public to hold the television industry accountable. It may take radically innovative measures to inject the public's voice into the system. With the setting up of a new network, this is the most appropriate time to try new approaches. There is no existing bureaucracy or corporate hierarchy already in place to defend a *status quo* that excludes citizens from participation in the most powerful medium of our time. Direct election by pay-TV subscribers of the network's governing board might just create the missing link in the accountability chain — and best fulfil the conditions of our public interest framework.

Who Regulates?

Control over the pay-TV schedule will be exercised within a regulatory framework that defines targets or sets limits in matters of content, contractual dealings, rates, and disposal of revenues. There is little argument that independent bodies such as the CRTC or provincial public utility boards should do the regulating, perhaps subject to broad government policy directives. But which level of government? On matters of local franchising or exhibition and subscriber rates, the issues are less significant to public rights in television than to policies for industry structure and ownership. Needs and priorities here differ widely across the country, and assuming that such matters for television generally are transferred to provincial jurisdiction, there are not serious problems raised by provincial regulation of pay-TV's "retail" end.

Regulation of schedule content is another matter. We want pay-TV to strengthen Canadian identity and foster interchange among our diverse communities. We want it to serve as a means of exchange with the world community. Those are all prime concerns of the federal authority. But the public-interest framework also sees pay-TV as contributing to regional identity and portraying a balanced social and cultural image of Canadians. Provincial desires to have a voice in these matters are legitimate. As well, the goal of geographically diverse programme sources is probably better served if one central body does not have sole regulatory power. At this point it seems that we are forced to contemplate either a new, joint regulatory authority or else a "double veto" system requiring approval of both levels. The second is unacceptable while the first would take us well beyond the scope of this chapter. In fact, neither may be necessary.

The case for *federal* regulation of schedule content is clear if one other goal of pay-TV is considered — a major expansion of the Canadian video production industry. The industry, it is hoped, will evolve in four or five world-class production centres across Canada. Yet there is only one English and one French market for high-budget productions, and those are national markets. Pay-TV will be the single most important factor in the expansion of Canadian video, but it is not an inexhaustible gold mine. The relative division of revenues between Canadian and foreign producers, and among the regions, will make or break a policy of decentralized, steady expansion. The levers for fine tuning this revenue flow — to inject added stimulus into one lagging centre, for example — have to be in the hands of a central body. Five centres, two languages, but only one industry, and its development is a national responsibility. This will become even more apparent as we attempt to build a Canadian presence in world video markets, or integrate production for pay-TV with the emerging home video disc and cassette industry.

Even though the schedule content of pay-TV should rest under the federal regulator, the matters of legitimate provincial concern cannot be ignored. The selection of network directors from all regions will help to safeguard a diversity of social and cultural perspective. A permanent federal-provincial committee on the production industry will be virtually indispensable to co-ordinate the available resources and programmes from both levels of government. And the federal government ought to be prepared to transfer regulatory powers over those elements of the television system that are or could be significant to provincial priorities — local programming on cable, broadcast television, and radio, for example, might be better co-ordinated with a province's social and community development policies.

Who Produces?

The public interest framework leads to very definite answers to the question of who should produce the programming for pay-TV.

First, no "vested interests" means no in-house production. The pay-TV corporation should not produce a single hour of its own schedule. The refusal of the CBC and CTV to open up their schedules to outside productions has ranked as the greatest obstacle to the maturation of the Canadian industry. We cannot afford a repetition of the same mistake.

The second relevant result we want is entertainment programming from more diverse sources, particularly from different production organizations than now supply the bulk of Canadian content. In-house programmes of public and private broadcast licensees (or their affiliates) should therefore be ineligible for pay-TV. They already have their own protected access into Canadian homes.

Essentially, then, it is the independent producers in all regions who will provide the programming for pay-TV. These may be private firms, the National Film Board, or new production corporations that some provinces may wish to establish. It would not be appropriate to set further national criteria of eligible producers. The industry is in such different stages of development across Canada that one province may wish to enforce separation of carriage and content, and disqualify cable distributors. Other provinces may find financial resources so scarce that cable participation would be welcomed.

One Network?

The most probable options on structuring the core programming (packaging) function of pay-TV are as follows: to allow a mix of competing national, regional, and/or provincial systems; to have one national network but several regional programming authorities responsible for their respective shares of the schedule (with perhaps certain time slots that are only for the regional audience); and one national network programmed centrally.

A mix of systems is the least desirable option *at this time*. On the product supply side, it is not known what quantity of quality entertainment programmes can be produced domestically. We would be wiser to start with one network, and when the supply proves more than one network can accommodate, then consider additional systems. On the revenue side, the impact of several systems would be to provide more markets for Canadian productions, but less return for each, since no competitor will have the audience size that the one-network option provides. In a choice between quantity and quality, we are directed by the first condition of our public interest framework to give priority to quality. We are to offer Canadian audiences the very best our industry can produce, and that means a system which, at least to begin with, puts more money into fewer works. Aside from the economics of quality, the collective goals of identity and interchange were felt appropriate to pay-TV because of its mass audience potential. By splitting the audience among several systems, some of which may not even be available to large parts of the population, pay-TV's contribution would be diminished.

The essential difference between the two other options boils down to a more coherent and balanced schedule (central programming) versus multiple entry points for producers (regional programming). A hybrid structure offering the advantages of both might be established as follows:

1. Regional programming authorities would each be allocated a share both of the budget and of the hours available for Canadian productions; would make their selection; and would forward these to the central office.
2. The central programming authority would make the necessary contractual arrangements for the selected domestic productions; would select the foreign productions and possibly a few additional Canadian ones; and would combine all into a network schedule. This structure would give to producers several potential "buyers," thus protecting the viewer against one perspective dominating the selection process. It can accommodate regional time slots for productions of less than nation-wide interest. It is well suited to the need for fine tuning revenue flows to the regional production centres and, by retaining a single network, does not fragment the

pay-TV audience. And if the proposal for election of network directors is adopted, it would be their regional authority that subscribers voted for, who in turn would nominate their representatives on the national authority.

The goals of interchange and national identity, incidentally, argue forcefully for a single structure rather than parallel French and English pay-TV organizations. There are no shared experiences through television when linguistic communities are programmed for in isolation. The use of subtitling, versioning, or reproduction of programming in both languages should be part of both schedules. The major drawback to a single structure is that as a national minority numerically, the francophone community's voice in programming will almost certainly be diminished. The negative ramifications could outweigh the less tangible advantages flowing from a single organization. Yet the two solitudes evident in the present CBC operations is a mistake worth avoiding. As an absolute minimum, even if programming structures for English and French are separate, the schedule of each network should have a reserved portion that is programmed by the other. Five hours of prime time a week on the English schedule, for example, could be filled by productions chosen by the French network. They would be in English, of course, preferably reproductions of original French programmes. This process might, as well, offer a means of revenue transfer to the smaller-audience French network.

Quotas?

Regulatory quotas are possible in pay-TV: either as floors or ceilings; on schedule time or programme spending; for regional, Canadian, or international content; on sports, performance, or film; for light or serious entertainment. We are not without experience to draw upon. We are virtually certain, for example, of the following:

1. As polls have consistently shown, a majority of Canadians seem to support the principle of quotas.
2. Quotas have a cost in efficiency of the programming body and in public regulatory resources.
3. Licence denial as a means of quota enforcement is not very effective.
4. On television, schedule time quotas are unrelated to actual budget expenditures.
5. On radio, where royalty payments are at a fixed rate per use of material, schedule time quotas are closely related to actual budget expenditures.
6. Quotas have come closer to their stated purpose in the Canadian recording than video industries. Bringing together the lessons from a decade of experience in quotas, with the priorities of the public

interest framework, we should know where and how quotas could be appropriate to pay-TV.

One implication we want from pay-TV is greater interchange, among regions and between Canadians and the world. This is foremost a function of access to the schedule. If viewers have little or no content available that comes from outside the iron quadrant of Canadian programme sources referred to earlier (Toronto-Montreal-New York-Hollywood), then there is no interchange, no expression of diversity, no opportunities for greater understanding, no mutual enrichment. Quotas on budget purchases would not alone guarantee sufficient access. The safeguards have to be at the level of the actual schedule if interchange is desired.

Two types of geographic quotas would appear necessary, and "Canadian content" is not one of them. First, internationally, a maximum percentage of imported programming allowed from any one country would broaden Canadians' contact with the world. This used to be a CRTC requirement, and if phased in gradually (say, starting at 90 per cent and reducing to 75 per cent over ten years), would give us the increased benefits from a range of cultures in a way that does not overpower.

Secondly, regionally, minimum percentages of programmes from each region would ensure an opportunity for being entertained by our differences in more positive ways than federal-provincial conferences. These percentages taken together would in effect form a Canadian quota. The regional breakdown is important to a strategy of developing a greater equality of flow within Canada. Purely for purposes of illustration, the following schedule time quotas on programme source might be in effect:

	English Network percentage		**French Network** percentage	
	1982	1992	1982	1992
B.C.	2	5	1	3
Prairies	2	6	1	4
Ontario	20	25	4	8
Quebec	5	10	33	40
Atlantic	1	3	1	4
North	0	1	0	1
Canada	**30**	**50**	**40**	**60**

The hours of programming originating from Ontario would increase, for example, but fifteen of the twenty new percentage points of domestic programming would come from other regions. Similarly, on the French network, Quebec programming would increase but not at the same rate as that from other regions. With co-ordinated development of the regional production centres, both the level of popular quality programming from Canadian sources and the opportunities for interchange would increase.

A second implication we want from pay-TV is the expansion of our video production industry. Here, quotas are probably necessary, although of a different sort. It is not so much access to the viewing schedule that is crucial to the industry but, more directly, its revenues. Two ways are possible to ensure that sufficient revenues flow from pay-TV to where they are needed across the country. Quotas on the programming budget are one way; for example, at least 3 per cent must be spent on productions from British Columbia. The alternative is to leave the pay-TV programmers free to allocate their budget as they wish and instead to levy a percentage (in the 15–25 per cent range) of gross pay-TV revenues and redistribute these through a fund to producers across the country.

In fact, the two approaches can be melded if a levy on gross revenues is implemented, but on a decreasing basis, as the programme budget allocation more closely approximates set targets. For example, if the actual allocation reaches only half the total of regional targets set, 20 per cent of gross revenues might be assessed, and if it meets the targets, no levy would be imposed. The attractiveness of such a measure lies in the guarantee of a revenue flow to each regional production centre, either by pay-TV network purchases or through the levy fund, without further restriction on the freedom of the pay-TV programmers. They would have the schedule time quotas to satisfy (regional and international). They would still be able to put their programming dollars where they felt would best entertain the Canadian viewer.

Should they opt for the pay-TV equivalent of game shows and low-budget talking heads, wherein CTV and Global have met existing Canadian content rules, the suggested approach contains a self-adjusting mechanism. Low-budget purchases to meet Canadian or regional schedule requirements will trigger a substantial levy on gross revenues, which, when redistributed to Canadian producers, would provide higher budgets for their programmes. The result is Canadian productions that are more competitive with imported programmes in viewer appeal, and accordingly more likely to be scheduled by the pay-TV network — not because of regulatory dictate but on their own merit. To give an idea of the magnitude of the dollars involved:

> Some 50 per cent of 4 million Canadian cable subscribers paying $10 a month for pay-TV produce gross annual revenues of $240 million, which levied at 20 per cent means a production fund of $48 million.

What $48 million means is ten times what the Canadian Film Development Corporation has to invest, or one third of the total value of feature film production in Canada in 1981, or almost the total Canadian programming budget of private broadcasters.

Of course, 50 per cent television or 30 per cent radio content rules are rather easy and arbitrary standards to pick compared to the fine tuning of revenue flows necessary for the steady expansion of quality, regional video. In particular, the regional targets set for pay-TV purchases will require a rather sophisticated and up-to-date analysis of the resources and capacity of each regional production centre at any given time. The CRTC alone, it is assumed, does not possess this expertise. No one body does.

As a corollary to the proposal, an ongoing federal-provincial-industry committee is an absolute necessity to monitor the development of video production capabilities across the country, and to recommend annual regional targets to the CRTC. This flexibility in response to short-term conditions is necessary. By itself, however, it permits the perpetual deferral to "next year" of progress toward greater regional, and hence Canadian, content. The process requires more concrete safeguards, an impetus to achieve results that is close to statutory in its force. Five-year overriding targets would be effective if they required the annual targets to make up ground lost in the preceding years. For example, set by the federal-provincial conference of ministers responsible for communications, these five-year benchmarks for regional video purchases would be sufficiently immune to private pressure.

Interchange and industry development, of all the goals contained in the public interest framework, are the only two where quotas seem appropriate to pay-TV. Concerning the balance among types of entertainment, or the quality of what is offered, there seems no better mechanism than the interaction of the programmer with the viewer.

This may appear to leave two other concerns rather poorly served. One is the goal of identity. The other is the related issue of whether productions made in Canada are truly Canadian. We know from the experience of the Capital Cost Allowance that even when most of the elements that go into a film are Canadian, from producer to screenplay, the product can be indistinguishable from a Hollywood creation. No less a problem exists that even if productions are Canadian in character, in view of our diversity, they may never contribute to our sense of what we have in common, what we share in heritage, life, or future. This is not to deny the production of programming that either transcends nationality, or gives expression to one particular community within that nationality. But somehow, sometimes, we require content whose identity is Canadian, not less, not more. To quantify "Canadianness," which quotas would require, seems as impossible as it would be shallow. Yet even qualitative analysis of video, in the context of Canadian identity, is poorly developed. This in itself would be a major and proper contribution of the CRTC, to provide as systematic an evaluation of schedules as is possible for the subjective, value-prone criterion of identity. The purpose would not be some future edict by the CRTC defining Canadian themes. It would be to stimulate public and industry awareness of one of the major goals of the Broadcasting Act.

We must be reconciled to the use of less direct or tidy means than content quotas to assure that Canadian or regional programming is not just Hollywood under a maple veneer.

- Pay-TV itself may be an important contribution if it helps to make the domestic market for our producers sufficiently lucrative that foreign sales are not their primary income.
- Tightened rules under the Capital Cost Allowance for video will increase the odds of Canadian themes relevant to Canadian audiences.
- CRTC suasion before licence threats may prove productive.
- CFDC script development assistance could concentrate more on truly Canadian themes.
- An expansion of the National Film Board's budget for co-productions with our private sector would be an important catalyst.
- Provincial film and video development corporations (or regional ones) would be major assets to many parts of the country.

Quotas have their place, in the schedule to assure opportunities for interchange, and in the programming budget to sustain an expansion of the Canadian video production industry. Where quotas, and comparable measures such as the eligibility criteria for fiscal incentives, are less effective than the qualitative improvements we seek from pay-TV, then we can design safeguards for social and cultural balance, improve citizen input, diversify sources of programming, and ensure better returns to Canadian producers. Taken together, these various measures should spark a creative and entrepreneurial explosion in Canadian video that can realize the potential in pay-TV for our development as Canadians, as individuals, as members of the global village.

Implications of the Pay-TV Decision

A majority of the Canadian populace have spent all of their lives in the atomic age. How else can we explain the reaction to pay-TV as though it were being dropped from on high, and the only decision of consequence left to us is the extent of the salvage operation to be mounted after the fact? We may be vulnerable to foreign forces. However, we are not powerless. The large economic and cultural trends of our time cannot be hermetically excluded from Canadian life, but the specific technologies and processes that come in their wake should be seen as potential instruments of public policy. Even if at one level Canadian policy is as helpless as King Canute before the sea, that has not prevented us from going ahead wih tidal power. In other words, if pay-TV is "inevitable," its implications are not.

There is a great deal at stake in the pay-TV issue, much more than just who and which groups will get rich from this newest licence to print lottery tickets. Pay-TV is, first of all, one of the two major litmus tests of Canadian determination to participate actively in the communications revolution. As Telidon is to hardware, pay-TV is to software.[3] The potential benefits to Canada from each are enormous. How decisively are we prepared to act to ensure those benefits? Secondly, the influence of pay-TV will far exceed its actual size just as *Le Devoir*, a small paper in terms of circulation, has been an important factor in Quebec politics. Properly designed, pay-TV will trigger major, beneficial changes throughout the whole of the Canadian television system. The publicly funded elements could concentrate more on that which the private sector cannot serve. Regular broadcasters would have access to higher-quality Canadian films and performance specials after their first run on the pay channel. Local programming should improve from the developing video production base across the country. These benefits will not just happen. They will happen only if the decisions governing pay-TV's introduction are made in context rather than in isolation.

Finally, pay-TV is important to Canadian *civilization*. The phrase "Canadian *civilization*" will raise more than a few eyebrows, but it is chosen deliberately. The concept is quite premature on any number of indices, from economic dependence to borrowed life-styles. Yet there is in the Canadian reality enough that is not only unique, but presents to the world both an understanding and a practice that are significant to human progress everywhere. Our interaction of geography-democracy-diversity has produced a matrix of processes, institutions, accommodations, adaptations, and insights that are as evident in our economic as in our political traditions. More than a seed, less than an orchard in full flower, Canadian *civilization* has reached at least adolescence. Awareness and its articulation are increasing but still sporadic. Our achievements are imperfect, be they in ecological harmony, social tolerance, critical awareness of our collective self, justice at home and abroad, citizen participation, psychological balance, and so on. We have a multitude of strains, cleavages, historical wrongs, and conflicting aspirations. Yet consider just the four nations closest to us in geographic size — the USSR, China, the United States, and Brazil — and what Canadians have evolved does not seem so inferior. *What is in question is our ability to sustain the Canadian experiment.*

There are no econometric-style computer models for precise prediction of present trends. "Nipped in the bud," however subjective an appraisal, seems the most likely outcome, or, to paraphrase George Grant, lament for a civilization. Countries as political boundaries may come and go, but any development of humanity's ability to live with the environment and one another is less expendable. What Canadians now face is a difficulty to appreciate their shared achievements, and added to that, an inability to learn from our diverse experiences. Those two factors alone have prevented our maturation.

So what does all of this have to do with pay-TV? It is a new medium that, in itself, could contribute to our shared sense of potential and how we appreciate diversity, both integral to Canadian development. It can, as suggested, give other elements of Canadian television a chance to contribute in ways they are best suited as effective and relevant participants in Canadian life. Most importantly, pay-TV, as part of the most powerful medium in our time and as the standard of quality, popular programming in that medium, should represent the most articulate expression of Canadian *civilization*.

What is produced for pay-TV will not only be viewed by most Canadians (on the pay channel or later on regular television), it is what the rest of the world is most likely to see from Canada. If we accept a pay system that is predominantly foreign in content, or if what we do produce is disguised or irrelevant to Canadian experience, then we become two-time losers. We deny ourselves the mass medium, of audiences and revenues, to communicate among Canadians our most sophisticated expression of what we perceive. And we fail to share with the international community the invaluable experiences that our nascent civilization has learned. We must remember that although documentaries are the most conscious expression of experience, it is the entertainment mode where the enduring myths and images are created. Canadians in Hollywood, London, and Paris have been major contributors to the entertainment programming and subconscious model/role/myth building of those countries. What *our* video industry might offer — if it is not overwhelmed by external communications before it can develop a process of Canadian-to-Canadian dialogue — is quality entertainment with a difference.

Notes

[1] There are other forms of pay-TV, which can be loosely grouped under the heading of "subscription services," that are likely to be offered to minority audiences. Multilingual and children's services are examples of this type already proposed, but in terms of production budgets, subscriber fees, and overall revenues, they are in a different economic league. Their introduction should equally be based on a framework of public goals and desired implications, though not the same framework as we are now elaborating for pay-TV.

[2] A special note is perhaps in order regarding this and the preceding point. Use of pay-TV to reach what we have called "collective goals" can be justified on the basis of incontravertible logic — and one formidable assumption. The "logic," as has been outlined, is that as channel choice multiplies and audiences fragment, pay-TV will become the channel most watched by Canadians at any given (prime) time. Pay-TV is therefore the best chance for television to achieve goals that depend on the greatest number sharing the same experience. Identity and appreciation of diversity become prime responsibilities of pay-TV.

The "assumption" is that Canadians will watch the Canadian portion of a pay-TV schedule. A high proportion of Canadian programming assists our production industry, but without the audience, collective goals remain unfulfilled. Whether the audience is there can be boiled down to a trinity of production budgets, hype, and tastes.

First, dollars do not assure quality or appeal, but the odds increase vastly of a Canadian programme competing favourably with an American one if both have comparable budgets. Secondly, there is no competition when an imported show has reviews in every major Canadian paper, prime-time spot ads, and touring stars on the talk-show circuit, while the Canadian production has a listing in the television guide. And thirdly, let us face up to the fact that we are conditioned to rather few formats set by Hollywood with which we are familiar, such as the jolts-per-minute measure of adventure dramas. Canadians are not going to abandon their taste for these overnight.

Perhaps comparable to our broadening culinary tastes as we grow up, Canadian appreciation of more diverse television entertainment modes is most probable if the fare is well prepared. Dollar for dollar and hype for hype, as Canadian programming approaches parity with the Hollywood imports, so will the audiences, because we are excellent practitioners of the video art. It is just that so many thousands of our citizens have had to prove their craft outside this country until now in the absence of sufficient domestic opportunity.

[3] David MacDonald, address to the Canadian Bar Association Conference in Vancouver, 27 March 1981.

Pay-TV in the United States: Its Growth, Regulation, and Prospects

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by
Kristin Booth Glen

Pay-TV, which the Canadian government and people are now considering, is already a significant phenomenon in the American communications industry. Pay-TV has taken several different forms in the United States: "subscription TV" involving the broadcasting of a scrambled signal; "pay cable" where pay services are provided as an auxiliary to normal cable services; and "pay programming over a multi-point distribution system" (MDS) as is used to service hotels and apartment buildings.[1] The purpose of this essay is to provide an overview of the history of the various pay-TV systems now operative in the United States, the regulatory stance taken by the U.S. federal government, and a general description of the present situation of pay-TV in the United States. Where possible, parallels or comparisons between the American and Canadian systems will be drawn, and, to the extent possible, the lessons of American experience will be considered in light of the options for regulation open to the federal and provincial governments of Canada.

Historical and Technological Development in the United States

In 1952 the Federal Communications Commission (the "FCC") — the U.S. analogue to the CRTC — was first presented with the possibility of transmission of programming for a fee charged directly to the viewer.[2] The petition filed by Zenith Radio Corporation, which requested adoption of its Phonevision system,[3] raised questions of the FCC's power to authorize pay or subscription broadcasting, and numerous policy questions as to whether, and under what conditions, such authorization was consistent with the "public convenience, interest or necessity."[4]

The FCC responded by issuing a *Notice of Rulemaking* calling for comments on a number of questions of law,[5] fact,[6] and public interest considerations.[7] Subsequently, in 1957, having satisfied itself of its jurisdictional power, but noting that many of its questions were not susceptible of hard answers, the FCC proposed to authorize field demonstrations on a trial basis.[8]

After receiving further comments and applications, and after some inconclusive interaction with Congress, the FCC authorized a trial experiment in Hartford, Connecticut.[9] Following three years of operation there, and additional comments and consideration, the FCC issued its *Fourth Report and Order In STV* (15 FCC2d 466 (1968)), authorizing the establishment of a nation-wide subscription television (STV) system subject to carefully prescribed conditions,[10] whose purpose[11] was to ensure that subscription television would serve as a "supplement" to conventional television rather than a replacement for it.[12]

The first formally licensed STV system did not go on the air until 1 March 1977. In the interim between the 1968 authorization and that date, two other pay-TV delivery systems had come into being, raising similar jurisdictional and policy questions to those previously considered by the FCC regarding STV. The first of these two were MDS systems, which were initially licensed in 1970. The first pay cable system was introduced by Home Box Office (HBO) in 1972. These two other systems, pay cable and MDS, together with STV, constitute the three modes of distribution of pay-TV in the United States today. Because they involve different technologies, the jurisdictional bases for and history of their regulation differ. The differing regulations have, in turn, largely resulted in the dominance of cable as the best known and major supplier of pay programming to American viewers. However, in order to understand the growth of pay-TV and its present economic and legal status, it is useful to briefly review the technologies of the three services, their regulatory histories, and the specific history of restrictions on pay programming that the FCC has or has not imposed on each of them.

Cable

Cable television is a communications system that distributes television signals and other programming and services by wire, or coaxial cable, rather than through the air. The basic cable system, presently operative in Canada as well as the United States, consists of a tower with antennae to receive television signals, a "head-end" to process the received signals and amplify them, and a network of cables to carry those signals from the head-end to the television sets of subscribers.[13] In addition to television broadcast signals, the cable system may receive programming via satellite transmission.[14]

Significantly for regulatory purposes, both of these modes of programme reception involve use of the airwaves,[15] but cable may be used additionally for distribution of locally produced programmes or provision of time and facilities to businesses, educational enterprises, the public or municipal agencies for programme production. A cable operator may also obtain and supply to subscribers specialized programming that it purchases nationally, but that is transmitted directly from the operator's studio over cable, without employing the electromagnetic spectrum.[16]

Pay programming is supplied over designated channels,[17] either by transmitting the signal only to those subscribers who have paid a fee, or by transmitting it in a scrambled mode which is unscrambled at the "box" that connects the individual's television receiver to the cable system.[18] At present, all transmission of pay programming on American cable is by fee per channel, rather than per programme, since equipment that would permit the latter is more complex and more expensive and, for historic reasons, was not employed in those cable systems that are presently in operation.

Subscription Television

Subscription television (STV) employs a standard UHF or VHF signal transmitted through an encoding device that scrambles the broadcast signal in any of a variety of ways.[19] The scrambled signal is received on its designated channel on all television receivers within that channel's service area. Only those receivers that are equipped with a suitable decoding device are able to unscramble the picture[20] and accompanying audio.[21]

STV systems vary in their ability to provide (and bill for) programming on a per-programme[22] rather than per-channel (usually monthly) basis.[23] The latter is, however, the prevalent type,[24] partially because it is substantially less expensive. Systems also vary with regard to their ability to measure viewership, with their security from theft or unauthorized reception and, of course, with their price.

Multi-point Distribution System

A multi-point distribution system (MDS) consists basically of a fixed station transmitting a signal omnidirectionally on microwave frequencies[25] towards numerous fixed receivers, each with directive antennae. The transmitted signal is (1) intercepted normally by an antenna erected at each customer-selected receiving location; (2) passed through a decoder that senses an address code and activates the receiving equipment if the address code corresponds to that assigned to the receiving site; (3) converted by a down-converter from the microwave frequency to a selected lower frequency; (4) conducted by a coaxial cable to the receiver; and (5) displayed upon an unused channel of a standard television receiver if the signal information has a television format, or fed to a data terminal, facsimile device, and the like, in the case of a non-television signal.

This basic system may contain modifications or varying components depending on whether it is being used for single-[26] or multiple-dwelling service, or as a source of supply to a cable head-end.

Where a multiple dwelling is involved, an existing master antenna system (MATV) can be employed to carry the signal to individual rooms or apartments once it has passed through the decoder. Where there is no MATV system, individual units must be wired from the down-converter, or a central wiring system must be installed at substantial additional cost.

An MDS may also be used in conjunction with a cable system either to provide continuity of pay service in areas not passed by cable,[27] or to feed cable head-ends. In the latter case, the cable system spreading out from the head-end would be the underground equivalent of the coaxial cable in (4) above.

FCC Jurisdiction and Regulatory History

The FCC's jurisdiction over various communications systems is derived from title II or title III of the Communications Act of 1934, or from some implied or residual jurisdiction emanating from one or the other. The title under which a service is regulated or, more specifically, the classification as "common carrier" (title II)[28] or "broadcaster" (title III)[29] that it is given, may have, and has had, substantial effect on its commercial development.[30]

Title III "broadcasters" are subject to, *inter alia*, limitations on ownership, imposition of the "Fairness Doctrine,"[31] and prohibitions against broadcast of obscene, indecent, or profane material, while title II common carriers are not. The information transmitted by common carriers is meant only for the designated customers of those carriers, and so receives protection from unauthorized reception under section 605 of the act.[32] Broadcast signals, intended for universal reception within their transmission area, receive no such protection. Broadcasters are ultimately responsible for what they broadcast: common carriers are not and, by statute, cannot involve themselves with the content of what they transmit.

With one possible exception, STV is regulated as a broadcast service under title III,[33] MDS is regulated as a common carrier under title II, and cable, which falls under no specific provisions of the act, is regulated under a "reasonably ancillary" jurisdiction recognized by case law. Brief summaries of the regulatory histories of the three services, exclusive of the pay-programme restrictions discussed below, follow.

Cable

Cable was originally created as a kind of glorified antenna system to bring a good television signal into homes that had poor reception. As such, beginning in 1966, the FCC regulated cable, then called CATV ("Community Antenna Television Service"), in a number of ways not directly related to its later use for the distribution of pay programming. These have included limitations on the importation of distant signals and non-network syndicated programming, and "must carry" requirements for local broadcast signals. Such regulations were approved by the U.S. Supreme Court as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[34] A requirement that cable systems of a certain size must originate local programming was also sustained under the "reasonably ancillary" standard,[35] but the scope of FCC "ancillary" jurisdiction was narrowed in a more recent case which struck down the requirement that certain cable operators provide "access" channels for use by the public.[36]

As discussed below, the narrower understanding of ancillary jurisdiction has been employed in striking down FCC regulations directed at pay programming on cable, and the extent and ability of the FCC to regulate in this area are now extremely questionable.[37]

Unlike the other two services, whose regulation is almost entirely federal, cable is also subject to some local or state control through the franchising process. Although maximum rates are set by the FCC, municipalities[38] generally grant exclusive franchises to operators with whom they bargain for various contractual provisions.[39]

Subscription Television

Subscription television is the only purely pay-TV service regulated by the FCC, although the use of air time leased from standard UHF or VHF television stations indirectly subjects it to the general broadcast regulations applicable to television licensees.[40]

The history of STV authorization and regulation, which has been previously discussed, involved several steps by which the FCC attempted to ensure that STV would "supplement" rather than replace conventional, "free" television. These included prohibitions on who could offer STV service, where, and under what conditions.[41] Briefly, these more "structural" limitations or restrictions on pay programming were as follows:

1. The so-called "complement of four" rule, that is, that only markets with 5 Grade A commercial signals are eligible for STV[42]
2. The "one to a community" rule, that is, no more than one STV authorization will be issued to any "community"[43]
3. A requirement that stations authorized to offer STV must continue to programme a minimum of at least 28 hours of "free" programming.[44]

In October 1979, the FCC repealed the one-to-a-community rule after examining the evidence of existing STV operations and their effect — or lack of effect — on commercial broadcasting. The FCC argued that increased programme choice could be made available without seriously affecting the supply of conventional programmes.

At the same time, the FCC suggested that it was rethinking its position on the "complement of four" rule, but to date it has not removed that restriction to free entry of STV into all markets.

For now, however, the remaining restrictions on pay programming by STV are that it can only be offered where there are four additional conventional, commercial channels, and that the station that offers the service must also offer a specified minimum amount of conventional broadcast fare.

Multi-point Distribution System

An MDS first became a possibility in 1962 when the FCC allocated a portion of the electromagnetic spectrum, 2150–2160 MHz, to an omnidirectional microwave transmission service to multiple fixed points. However, the spectrum space allocated remained virtually unused and unusable until 1970, when the FCC increased the bandwidth available for individual channels from 3.5 MHz to 6 MHz.[45] This change was critical, since the larger bandwidth is required for the transmission of colour, video, and audio.

Once the bandwith was increased, applicants began to file for construction permits and operating licences, and the FCC determined to establish rules for the new service.[46] In adopting rules, the FCC expressed its concern about the problem of "potential congestion" of the allocated band, which it dealt with in a number of ways. Subsequently, the FCC authorized a second 6 MHz channel in the fifty largest metropolitan areas by expanding MDS into the 2160–2162 MHz band.

The FCC had originally envisioned MDS as a service

> ...to provide for relay of instructional and training television to schools, industry, municipal government and for other miscellaneous uses such as the coverage of business industry or medical conventions.[47]

However, the log-jam that occurred while numerous applicants competed for one, or at most two, channels in major areas prevented the formation of an MDS "network" for nation-wide transmission of business data. Pay-TV marketers filled the vacuum by purchasing blocks of prime time that they used for delivery of HBO, Showtime, or other pay programming.

In part because of the widespread use of MDS for pay-TV, in March 1980 the FCC announced a rule-making proceeding that could result in the possible reallocation of frequencies on the 2500–2690 MHz band to provide ten additional MDS channels, as well as the establishment of new technical standards for acceptable interference and geographic spacing between channels in the presently allocated band.[48] Since MDS service, like STV, presently has only single-channel capacity, promulgation of such rules might mean the development of multi-tier pay programming,[49] or more than one pay-TV operator offering more than one service in lieu of, or in competition with, either STV, cable, or both in a single market-place.[50]

Finally, it should be noted that local efforts to indirectly regulate MDS by regulation of MATV systems have been found to constitute impermissible interference with federal regulation and to be pre-empted by the FCC's broad jurisdictional power in the area.[51] The FCC has also held that state certificate of compliance could not be required for operating authority where an MDS applicant proposed interstate service.[52]

FCC Restrictions on Pay Programming

From the time of the Zenith petition in 1952, the FCC has attempted to balance a perceived need for increased diversity in the sources and kinds of programming available to the public against possible threats to conventional or "free" broadcasting, in so far as they implicated the public interest considerations of the Communications Act of 1934.

The FCC's concern, and the balancing it has attempted, are reflected in a series of restrictions it has imposed on pay programming over cable, STV, and MDS. These restrictions have varied by service, generally as a result of the amount of jurisdiction the FCC believed it could exert; they have also varied over time as questions of fragmentation, programme siphoning, and the like have moved from speculation[53] to hypotheses that may be reasonably tested by actual experience.[54]

The restrictions have generally dealt with two separate sets of concerns; the fear that pay-TV would "siphon" particular kinds of programming away from conventional, "free" television, and the fear that pay-TV would fragment audiences or otherwise decrease the amount of programming available over conventional television.[55] The former concern provided the basis for the various "anti-siphoning" rules the FCC considered and/or adopted for the various regulated services from 1968 to 1978; the latter resulted in such requirements as the "one-to-a-community" and "complement-of-four" rules for STV previously discussed. It is, however, the anti-siphoning rules, which may be of particular interest to Canadian policy makers,[56] with which we are here concerned. The history of those rules will be briefly discussed chronologically by service.

STV to 1968

The FCC first adopted anti-siphoning rules for STV in the *Fourth Report and Order in STV*. Fears that STV might siphon either programmes or talent[57] from conventional television had led the FCC to request comments on a number of possible regulations to prevent such siphoning.[58] In the *Report*, the Commission

> . . . attempted to strike a balance between the danger of allowing STV operations to acquire enough economic power to destroy free broadcasting, and the risk of hedging the new service, with so many restrictions that it would 'smother' before it ever got started.[59]

In so doing, it adopted rules governing the kind and quality of feature film[60] and sports[61] programmes that might be broadcast over subscription television, entirely barred STV broadcast of series programming, and severely restricted the broadcast of commercials. In addition to the restrictions on STV broadcast of specific film and sports programming, the FCC also adopted a rule prohibiting any television station from devoting more than 90 per cent of its STV programming hours to feature films and sports combined.

The anti-siphoning rules adopted in the *Report* were affirmed by the District of Columbia Circuit in *NATO* v. *FCC*, where they were challenged as violative of the First Amendment and section 326 of the act.[62] The court noted that, in promulgating the rules, the FCC was engaged in "administering a scarce communications resource, the broadcast spectrum" (p. 207). It wrote,

> . . . it seems obvious that the Commission sought only to insure the continuing economic vitality of free television and not to affect the ideas which could be presented on either free or subscription television. Thus, when the net effect of the program restrictions is considered, it seems quite likely that the public in STV areas will receive more rather than less diversity of expression in its television programming (p. 208).

Cable to 1970

Although the *STV Further Notice* included questions about pay cable, then referred to as "wire or cable STV,"[63] in its *Report*, the FCC declined to determine whether the rules adopted for STV should apply to pay cable. Instead, it commenced a new proceeding, and, in 1970, essentially identical anti-siphoning rules were adopted and applied to cable programme originations for which a "per program or per channel charge [was] made."

MDS After 1970

After the authorization of MDS in 1970, the FCC became aware that the new service might be employed to supply entertainment programming. Accordingly, it raised the question of whether anti-siphoning rules similar to those it had adopted for cable and STV would be appropriate.

In 1973 the FCC consolidated several individual proceedings involving transmission of entertainment material to hotel master antenna systems by various technical means including wire and MDS.[64] It requested comments on whether the anti-siphoning rules that had been adopted for STV and cable should be applied, or applied in a modified form, even though neither broadcasting (STV) nor reliance on broadcast signals (cable) was involved.

Although comments were filed, and the FCC again referred to the docket in its 1975 *Pay Cable Report*, no further action was ever taken. No anti-siphoning rules were ever adopted for MDS, nor for any of the hotel services covered in the docket.

Cable and STV, 1975 to the Present

Between the first rules adopted for cable and STV and 1975, the FCC entertained a number of proceedings, called for comments, heard oral arguments, and the like, in the process of reassessing those rules for both services. Significantly, of course, there was, during all this time, no operating STV station, and the amount and penetration of pay cable was exceedingly small. Not surprisingly, the *Report* and *Order* issued after all of this activity made no substantial charges, rather they only slightly relaxed the rules previously applicable.[65]

The rules adopted in 1975 were challenged by pay operators and reviewed by the United States Court of Appeals for the District of Columbia Circuit[66] in a case called *Home Box Office, Inc. (HBO)* v. *FCC*.[67] The court struck down the cable rules as beyond the FCC's jurisdiction,[68] unsupported by the record,[69] and violative of the First Amendment. On the other hand, in large part because of the FCC's greater jurisdictional authority over STV, and because the rules were premised upon the rationale of spectrum scarcity upheld in the *NATO* case, the court permitted the anti-siphoning rules to continue in effect for STV.

Subsequently, after formally deleting the anti-siphoning provisions from its cable regulations,[70] the FCC determined that there was no public interest in treating cable and STV differently in so far as programme availability was concerned. Accordingly, it took the same action for STV, while reasserting its jurisdiction to reimpose such regulations in the future, if necessary.[71] As of this date, there are no longer any programme restrictions on any of the three pay services.

Pay-TV in the Market-place

Deregulatory Trends

The removal of anti-siphoning restrictions from pay-TV services, while partially mandated by the *HBO* decision, is symptomatic of a more general deregulatory trend in U.S. communications law and policy. The trend toward deregulation is part of a general marketplace, neo-classical, Chicago-school economic analysis that has become the predominant position of the Reagan administration. Regulatory controls are abandoned as "inefficient" or unnecessary, and "marketplace solutions" are favoured in most areas.

Communications, and particularly pay-TV, are no exception to this general trend. The deregulation of pay-TV, and the services by which it is delivered, is justified in large part by the FCC's desire for a "market-place solution" to the problem of network domination of American television.[72] Years of FCC regulations have failed to entirely control the three major networks' power, and the FCC has, after an extensive and costly study, essentially thrown up its collective hands with the expressed hope that the new technologies, spurred by the actual and anticipated profits of pay-TV, will develop alternative networks or otherwise break the hegemony of ABC, NBC, and CBS.

There are, of course, critics and criticisms of this approach, both without[73] and within the industry.[74] Needless to say, some industry groups favour complete deregulation for *their* services, while urging the FCC to impede or indeed to halt the development of others.[75] Although the act under which the FCC presently operates was written precisely to provide for democratically controlled government intervention where the market-place failed to provide the requisite service and diversity,[76] the FCC and its new Reagan-appointed majority appear likely to continue and accelerate their abandonment of all but technical regulatory controls.[77]

Competition Among Pay-TV Services

Subscription television, cable, and MDS are natural competitors for pay-TV subscribers in a given area, with cities in which any one, two, or all three provide services. Cable has, however, been dominant, garnering around 90 per cent of all pay-TV customers in the United States.

Each system has its own advantages and disadvantages that relate primarily to technology and/or cost. For example, STV has only single-channel capacity and suffers some signal transmission problems; its amortization time must be shorter because it is dependent upon three-year licence renewals as opposed to cable's twenty-or-more-years franchises. The break-even point for an STV operation is about 35 000 to 40 000 subscribers; the break-even time is projected at approximately twenty months.[78]

An MDS also has only single-channel capacity, but has a more limited signal range than STV. Further, because it depends on line-of-sight transmission, MDS has the greatest reception problems. On the other hand, MDS has substantially lower start-up costs and proposed break-even points of 4 000 to 5 000 subscribers and twenty-five months of operation.[79]

Cable has multi-channel capacity and generally problem-free reception. However, it has by far the highest start-up costs and an estimated forty-three months before breaking even.[80] Additionally, there are large numbers of outlying and/or sparsely populated areas where it is doubtful that cabling will ever be economically feasible in the United States.

Given these technological and economic differences, the role of FCC regulation or non-regulation has loomed large. At least for STV and MDS, the ability to go "get there first" or to make a "pre-emptive strike" before another pay service enters the market may be critical. A major problem for both services has been the "log-jam" of comparative applications awaiting FCC action before they can go on the air.

As of December 1980, despite numerous pending applications, only fifteen STV systems were operating on-air, with 803 000 subscribers.[81] At the end of 1979, MDS had approximately only 4.1 per cent of the pay market-place.[82] While STV and MDS may prove successful in certain areas over the short run, it appears that cable will continue to dominate the American pay-TV market for the foreseeable future.

Pay Programming Services

Impact on Programme Availability

A major question considered by the FCC, albeit in something of a vacuum, when first authorizing pay-TV was the sources, kinds, and contribution to diversity of programmes that would be shown for pay. The deregulation of programme restrictions similarly took place with a limited empirical record for pay cable, and a virtually non-existent record for STV. Today, however, evidence is mounting that the hoped-for new, more specialized, or simply "more" programming has failed to materialize from the growth of pay-TV. Rather, the control of production and distribution of programming is becoming ever-more concentrated; innovation is disfavoured as pay entrepreneurs, like the "free" networks before them, seek the largest audiences with the lowest common denominator product; and programming, especially films and sports, is indeed being siphoned, at least temporarily, from "free" to pay-TV (the "windows" phenomenon).

These disheartening, if not downright disturbing, conclusions are the result of a number of related facts and occurrences, which will be briefly discussed.

Concentration

In the past several years, a handful of pay-TV programme distributors have come to dominate the market. Because of the lack of federal regulatory control over the cable industry,[83] these programme distributors are highly vertically integrated, with ownership of delivery systems, primarily cable systems, production facilities, and in some instances STV and MDS franchises and even broadcast stations.

The largest, and by far the dominant, of these new pay-TV "networks" is Home Box Office (HBO), a subsidiary of the communications giant Time, Inc. The extraordinary power of Time, through HBO, is demonstrated in the following chart of subscriber counts for pay-TV programming services as of 31 May 1981. Time, Inc. owns cable systems with 1.2 million basic subscribers: Time-Life Films, which is a programme producer, syndicates, *inter alia*, BBC programming for American television; and American Television and Communications Corporation, 'AT & CC', a wholly owned subsidiary which manufactures STV equipment, operates STV franchises and MDS systems.[84]

Table 1
PAY-TV SERVICES IN THE UNITED STATES BY SYSTEMS BOOKED AND HOMES PASSED, 1981

Service	Systems Booked	Homes Passed
Home Box Office	2 500	6 000 000+
Showtime	1 100	2 000 000
The Movie Channel	1 050	975 000
Cinemax	200	200 000
Home Theater Network	160	160 000
Rainbow	40	80 000
Private Screenings	5	80 000
Gala Vision	80	75 000

Source: Cablevision (22 June 1981), p. 24.

The second largest pay programming distributor is Showtime, a joint venture of Teleprompter, the largest cable MSO, and Viacom, which has substantial interests in cable, broadcasting, STV, and MDS.[85]

A leading student of media concentration, analysing these and other data, has warned of a potential for monopoly domination, far outdistancing that previously exercised by the broadcast networks. In an exhaustive study entitled *Who Owns the Media*, Serling wrote:

> Ironically, Federal Communications Commission efforts to diversify ownership in broadcasting may well be substantially undone by developments in cable television. For one thing, the expansion of cable, and especially the expansion of satellite distributed pay cable systems, is already providing a potential "network" operation parallel to the broadcast networks.

> As a result, many of the companies developing cable systems are also either current or potential suppliers of programming or information. Warner, UA-Columbia Cablevision, Viacom, Teleprompter, Times Mirror, General Electric and Times, Inc. are among the firms that have cable or pay television businesses and like the broadcast networks are also in a position to provide transmission facilities as well as content. Unlike the networks, however, which are limited to five VHF outlets, in the absence of cable regulation, MSOs can have extensive cable holdings around the country as well as supply the programming content. *Potentially, then, they may accomplish what the broadcast networks have been prohibited from doing controlling the distribution as well as the content.* . . . The dominance of commercial network television may be broken by the wired distribution system, which, combining cable, microwave and satellite delivery, provides more choice to viewers. What remains to be seen is whether the increased number of channels will actually provide a greater variety of programming although logic says that this should be the case. . . .
>
> But whether ownership is diversified sufficiently to allow entry of important new ownership voices such that content diversity is truly increased, remains in serious question. As the 1980s begin, the trend in cable and pay cable suggests that centralized control, and a resultant emphasis of the same kind of entertainment material of older films and television media, will continue for the immediate future (emphasis added).[86]

There is an interesting, although hardly encouraging, side-note to this. Although the networks themselves are presently prohibited from owning cable systems,[87] all have announced intentions, and indeed have begun operations in cable and pay-TV programme production and distribution.[88]

Programme Quality and Diversity

Despite continuing forecasts of a video version of the "Renaissance,"[89] little of the promise of pay-TV to enhance diversity and serve minority tastes has been realized. There is, almost everyone agrees, a serious shortage in programming to show over pay and other new outlets, and pay customers are confined primarily to movies, sports, and occasional "Las Vegas-type" entertainment specials.[90]

The lack of "software" is exacerbated by the trend toward "tiering" or offering several different pay services to cable customers.[91] Frequently the lack of product necessitates that different services programme a number of the same movies each month, with only a difference in scheduling.

The lack of adequate new programming for pay has, in turn, at least partially caused the final observable effect of pay-TV on the traditional broadcast media, a degree of siphoning, whether total or temporal, of films, features, and sports from conventional "free" television.[92]

Neo-Siphoning, or the "Windows" Phenomenon

The scarcity of programming for pay services has not generally resulted in a substantial increase in programme production, but rather in a new order of programme distribution. A feature film, which might first have been shown in theatrical release, and then on free television, may now be sold for pay-TV distribution for a year or more prior to its conventional television exhibition.[93] A film or mini-series that might previously have been "made-for-television" is now more likely to be shown first — with a period of exclusivity — over pay-TV and then seen on network television. One trade magazine reports on

> ...the growing intent on the part of the program suppliers to get as much mileage as possible out of increasingly costly television productions. This means cutting pay and basic cable in on the action before broadcast TV gets its hands on the goods.[94]

This new distribution pattern, called "windows" in the trade, may have substantial repercussions beyond the mere delay in airing programmes over free television. One is the impact on the kind and quality of programming that can be expected. Another is the effect on public, non-commercial, free television presently available in the United States.

Programme Quality

In large part, the admitted lack of innovation in any additional programming produced for pay[95] is a direct result of the windows phenomenon. If a programme producer knows that her or his ultimate distribution pattern will be pay-TV, non-pay cable, network television, and finally syndication, that producer will, of economic necessity, produce programming that appeals to all those markets — that is to say, the lowest common denominator.[96] Thus, the promise of specialized quality programming for minority tastes over pay-TV seems less and less likely, in a climate controlled only by market-place forces where maximization of profits almost invariably weighs more heavily than diversity of ideas.

Siphoning from Public Television

In the United States, the blandness of network television, and of subsequently syndicated "independent" stations, has been offset to some degree by the existence of commercial-free public television. Public stations have broadcast more than their share of cultural programming, including such popular successes as "Live From Lincoln Center" and "Live From the Metropolitan Opera." These and similar broadcasts have provided access to music, opera, dance, and theatre for millions of Americans who would otherwise be precluded from such experience by cost or geography.

The creation of pay "culture" channels such as Bravo[97] does not necessarily mean the availability of new artistic programming in addition to that seen on public television. Rather it may well cause that which has been available for free to now be offered only at a price. The Public Broadcast System (PBS) itself, hampered by inflation and federal budget cuts, has already announced the formation of its own pay programming division, which will presumably draw on those sources with which it has already had the greatest success, and for which an audience already exists.[98] The PBS proposal would presumably result merely in a substantial delay in the time in which public television would show particular cultural programming, that is, simply a later "window,"[99] but the former, commercial "siphoning" of popular cultural material might mean its loss to free television — and millions of non-affluent viewers — forever.[100]

Sports Siphoning

There is, additionally, one area where "windows" or delayed distribution patterns simply are inoperative — live sports events. Once a baseball game has concluded, few viewers are interested in watching it as an exercise in post-mortem analysis. It was precisely this special immediacy of sports, and the fear of their total loss to devoted "free" television viewers, that caused the anti-siphoning rules originally adopted by the FCC.

To date, pay networks have not had sufficient economic power to outbid conventional television networks for major sports events — such as the Olympic games, or the World Series — but as pay penetration increases this may no longer be the case. Events for which a large single charge can be levied are particularly susceptible to siphoning; for example, STV viewers in Los Angeles paid $10 a piece to see the first Leonard-Duran welterweight match and $15 per subscriber to see the second.[101] If pay per view becomes the dominant form of pay distribution, as proposed for Canada, the financial resources available to pay suppliers[102] might well make this total siphoning of major sports events a reality for Canadian viewers.[103]

If a concern of communications policy is, as the American act states, "to secure the widest possible service to all the people of the U.S.," then the unfettered growth of pay distribution must be weighed against the potential and, in the United States, the beginning of the reality of siphoning programmes from their former availability to all to the more affluent few.

The Relevance of American Experience for Canadian Pay-TV Policy

This essay has attempted to explore and document the history of American regulation and non-regulation of pay-TV, and to describe the growth and results of the existence of pay-TV in the United States today. Some parallels are obvious. The Communications Act of 1934, like the various bases of Canadian federal jurisdiction, simply was not written to include the new technologies, and so has resulted in the creation of hybrids that muddle legal and constitutional considerations.[104] Clarification of the legislation enabling regulation may make the job of regulators easier and that of courts more predictable.

The promises made for Canadian pay-TV, particularly the Utopian notions of diversity and specialized services,[105] resonate to those which encouraged the FCC in its authorization of pay-TV services in the United States. As the American experience has shown, the existence of new outlets does not automatically generate more, better, and more specialized programming; in fact, quite the contrary may be the case.[106]

The American experiment with a relatively unregulated pay market-place has demonstrated that at least if diversity and quality of service are goals, the pure profit motive is no substitute for enlightened regulation. Regulation is, after all, a democratically controlled response to the inevitability of some market-place failures. Through the regulatory process, to a greater or lesser extent, the public and its elected representatives have the final say over how the nation's telecommunications resources are to be used and how, perhaps, society itself may change as a result. To abandon regulation for market-place solutions is to take the power of self-determination from the hands of the many, and place it instead in the hands of the few.

The final chapter in American communications is far from written, and the headlong rush to deregulation may yet be halted. In designing a pay-TV policy from its inception, however, the Canadian people can hopefully benefit from the trials and errors of their neighbour to the south.

Notes

[1] A fourth mode of pay-TV delivery, direct broadcast satellite ("DBS") transmission is still in the planning stages, and so is beyond the scope of this paper. For an excellent discussion, see David M. Rice, "Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options," *New York Law Society Law Review* 25 (1980): p. 813.

[2] As an historical matter, the issue first arose with regard to STV, where the early history of what will be generally referred to as pay-TV is discussed. STV or subscription television will be used interchangeably.

[3] Phonevision had been previously tested on a trial basis; it had originally contemplated the use of telephone lines to transmit a connecting signal to the subscriber and subscriber billing to be done by the telephone company. 20 *Federal Register* (1955), 988.

[4] The FCC is charged, under the Communications Act of 1934, 47 USC §303 (the "act"), to regulate consistent with this standard, and it is against this standard that rules, regulations, and policies are promulgated, frequencies allocated, licensees chosen, and the like.

[5] These included questions of the Commission's authority under the 1934 act, whether subscription broadcasting constituted broadcasting or common carrier service under the act and/or what amendments to the act might be required to permit the exercise of regulatory power. 20 *Federal Register* (1955), 988, 989.

[6] These included questions about technical data of proposed systems, degradation, if any, of conventional broadcast signals by subscription television, operation, costs of equipment and service to subscribers, relationships between subscription television and conventional broadcast service on any station where both were to be employed, the possible availability of new programming, patent and licensing agreements, kinds and sources of programmes to be broadcast, and the role, if any, of the motion picture industry and/or networks. *Ibid.*

[7] These included the impact of subscription television on traditional "free" (advertiser supported) broadcasting, the effect on the broadcast of news and dissemination of views on controversial issues, the safeguards necessary to ensure that the public in all parts of the country would be provided with well-balanced programming without charge, the means necessary to ensure that subscription service would be available to all stations on a non-discriminatory basis, and the safeguards necessary to prevent possible monopolistic control of subscription television. *Ibid.*

[8] Further Notice of Inquiry, 22 *Federal Register* (1957), 3758.

[9] The FCC's actions leading up to the Hartford agreement included the *Further Notice of Inquiry*, 22 *Federal Register* (1957), 3758; the *First Report and Order*, 23 FCC (1957), 532 (affirming the Commission's statutory authority); the *Second Report and Order*, 10 RR (1958), 1539 (deferring applications on proposals pending congressional considerations); and, after inconclusive congressional action, the *Third Report*, 26 FCC (1959), 265. Subsequent to the *Third Report*, the application for operation in Hartford was granted after a hotly contested hearing, *Hartford PhoneVision Co.*, 30 FCC (1961), 301 affirmed *Connecticut Committee Against Pay TV* v. *FCC*, 301 F.2d 835 (D.C. Cir.), cert. den. 371 U.S. (1962), 816. The Hartford experiment itself is fully described on p. 589 of Appendix B to the *Fourth Report and Order in STV* 15 FCC 2d (1968), 466.

[10] With one exception, these rules are still the basis for STV authorization and operation today. They are discussed more fully below.

[11] Other policies reflected in the *Fourth Report and Order in STV* were encouraging the utilization of UHF frequencies and encouraging diversity of programming and programme fare.

[12] In connection with this concern the FCC adopted certain "anti-siphoning" restrictions and pay programming, which are discussed below. These rules were subsequently applied to pay programming transmitted over cable. *Memorandum Opinion and Order on CATV*, 23 FCC 2d (1970), 825.

[13] For a fuller description of the way cable works, see W.S. Baer, M. Botein, L. Johnson, C. Pilnick, M. Price and R. Yin, *Cable Television: Franchising Considerations* (New York: Crane, Russak, 1974).

[14] The cable system may have its own earth receiving station ("dish"), or may obtain the satellite transmissions by microwave from a dish located elsewhere.

[15] The basis of FCC regulation of cable was originally premised on its use of broadcast signals or microwave transmission of signals, see, for example, *United States* v. *South Western Cable Co.*, 392 U.S. (1967), 157. Where neither is employed, the FCC's jurisdiction is unsettled and questionable. Similarly, although the Canadian Supreme

Court has upheld federal jurisdiction over cable because of its reliance on off-air broadcast signals, *Capital Cities Communications* v. *Canadian Radio-Television Commission*, 2 SCR (1978), 141, it has specifically declined consideration of closed-circuit cable distribution systems. *Public Service Board* v. *Dionne*, 2 SCR (1978), 191.

[16] The efficiencies and economies of satellite distribution have, however, made this form of distribution of pay programming almost obsolete. See, generally, Les Brown, "From the Air: Programs by Satellite & Cable," *New York Times* (17 February 1980), §3, 6, col. 5.

[17] Cable, of course, has multi-channel capacity, with present systems offering between 12 and 35 channels. The development of fibre optics has made capacity up to 100 channels a possibility.

[18] See the discussion of "unscrambling" or "decoding" in the description of STV and MDS technologies.

[19] The FCC has approved eight different systems for encoding and decoding; four of them are presently in use in actual STV operations.

[20] Scrambling (or "encoding") and descrambling (or "decoding") are accomplished roughly as follows: a television picture consists of a large number of horizontal lines transmitted sequentially. A single picture frame consists of 525 lines of video information; of these the first 22 lines are purposely blank to tell the receiver where each frame begins and ends, that is, where the top and bottom of the picture are. Other lines consist of the following:

1. A sync pulse, which tells the TV receiver where the line starts
2. Color information
3. The actual video displayed on the TV screen along that line.

Most STV systems mask the sync pulse of the transmitter so that sets without operating decoders receive the horizontal lines without reference points. The result is a vertical "tear" through the picture that varies rapidly as the TV receiver searches (vainly) for the beginning of each line. The decoder reimposes the correct pulse on the horizontal lines so that the "picture" again becomes intelligible.

[21] In addition to scrambling the TV picture, all encoding devices remove the sound from the standard audio channel and place it on a subcarrier. A non-subscriber thus receives a scrambled picture with no sound, while a subscriber receives FM sound, which corresponds to the programme audio over the sub-carrier.

[22] For example, in one system, when the viewer pushes the "on" button for a particular programme, the decoder stores that information; once a month (or immediately in other systems) it "dials" a central computer to which it is attached by phone lines and reports the programmes selected by its subscribers. The computer then bills the subscriber on the basis of this information. Since the decoder and central computer are connected by telephone lines, the computer can also deactivate or shut off any individual decoder for non-payment or any other reason.

[23] Where per-channel billing is used, the subscriber may be sent a card or chip each month or pay period; the card activates the decoder for that period but must be replaced by another at its end; the new card is presumably sent out when the subscriber pays his/her bill. Some systems that are generally used for per-channel billing also have limited per-programme capacity.

[24] The SELEC TV system employed by American Subscription Television Companies ("AST") and the Oak system, used by National Subscription Television ("NST") in Los Angeles, both permit per-video or per-programme billing, but the prevalent mode of STV delivery is per-channel billing.

[25] The signal originally comes from any of a number of sources, such as earth satellite receiver or studio equipment (tape recorder, video tape recorder, camera, etc.). It is fed into an up-converter/amplifier driven by an exciter that multiplies the signal, and mixes it in a microwave mixer with the output from the exciter to obtain the proper operating frequency.

[26] MDS service to single-family dwellings is a relatively new phenomenon — although one which vastly increases the potential of the service — for two reasons. First, it is only recently that antennae and down-converters have been developed that could be manufactured and sold at a price low enough to justify single, rather than multiple, family installations. Second, because MDS uses microwave transmission with its attendant "line of sight" limitations, single-family installations are practical, in reception terms, only in relatively flat areas without high buildings or other obstructions. Anchorage, Alaska, and Phoenix, Arizona are, accordingly, two of the primary single-family MDS markets.

[27] This might occur because the cable owner's franchise stopped at a geographical boundary, but the MDS signal could "pass" homes substantially beyond that artificially created line, or because certain areas within a franchise do not contain enough potential subscribers to make it economically viable to cable them.

[28] Title II of the act is relatively unelucidating, defining "common carrier" only as "a common carrier for hire in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy" (47 U.S.C. §153(h)). According to the FCC's rules, a communication common carrier is "any person engaged in rendering communication service for hire to the public." (47 CFR §21.1 (1978)). The basic notion inherent in common carrier status is holding out facilities for non-discriminatory use by the public or any reasonable class of the public. The common carrier licensee does not select or provide the information or programming ("intelligence") that is transmitted over its facilities; it only leases time in accordance with tariffs filed with the FCC (47 CFR §61.51 *et seq*) on a first-come, first-serve basis (47 U.S.C. §201, 202). It is the customer, not the carrier, who "designs" and "chooses" the intelligence transmitted.

[29] Under title III, the FCC has jurisdiction over the use of "any apparatus for the transmission of energy or communications or signals by radio" (47 U.S.C. §301), that is to say, it may regulate any use of radio frequencies in the electromagnetic spectrum for over-the-air transmission. Title III primarily deals with the FCC's jurisdiction over broadcast stations, but any title II common carrier that uses over-the-air transmission must also obtain a licence — in a comparative proceeding — under title III.

[30] Because few channels are available, and because the act requires comparative hearings in the case of mutually exclusive applicants for the same facilities, both STV and MDS operators have been substantially slowed in their ability to get on the air because of a "log-jam" of pending applications at the FCC. Network Inquiry of the FCC, Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (1980), Vol. 1, 96–97, 101–102 (hereafter *New Television Networks*).

[31] The Fairness Doctrine, codified in §315 of the act, requires broadcast licensees to broadcast matters of public controversy and, when they have done so, to air both sides of that controversy.

[32] Unauthorized interception is a crime; a civil cause of action has also been implied.

[33] STV operators, concerned about the sale of unauthorized decoders, have brought civil suits against manufacturers and distributors of those decoders alleging violation of §605. Recognizing that STV is classified as a broadcast service and that broadcast signals are not covered by §605, a number of U.S. Appeals Courts have, however, granted relief finding that the STV signal is not "intended for use by the general public," for example, *National Subscription Television and Oak Park Broadcasting Systems* v. *S & H TV Inc.*, 644 F.2d 820; 49 Pike & Fischer Radio Reports 2d 789 (9th Cir., 7 May 1981).

[34] *United States* v. *Southwestern Cable Co.*, 392 U.S. (1968), 178.

[35] *United States* v. *Midwest Video Corp.*, (*Midwest I*) 406 U.S. (1971), 649.

[36] *FCC* v. *Midwest Video Corp.*, (*Midwest II*) 440 U.S. (1979), 689.

[37] There are potentially other jurisdictional bases for FCC regulations of cable — that is, its jurisdiction over microwave relays and earth stations used by cable systems. Since one or both are used by virtually every cable operator offering pay programming, the

FCC could, if it wished, attempt new direct regulations of pay cable. In its present deregulatory climate, however, this seems unlikely.

[38] In five states, the authority to grant franchises has been taken from municipalities and placed under the jurisdiction of state public utility commissions or cable commissions. Two states that permit municipal franchising, New York and Minnesota, have, however, passed state-wide laws governing the processes to be employed in awarding franchises, with a particular emphasis on guaranteeing citizen involvement.

[39] These have included provisions for access, local programming and studio facilities, kinds of programming services to be offered, etc. Stearns, *A Short Course in Cable*, pp. 14–19. In the latter area, of course, state or franchising authorities might attempt to exercise jurisdiction over some aspects of pay programming, such as a requirement that it be presented bilingually, or on separate channels in two languages.

[40] Because STV is broadcast over the air, there must be an allocated television channel with a broadcast licence. The STV franchisee (who may or may not be the station licensee) leases time (generally prime time) to broadcast pay programming. The franchisee (STV operator) is also responsible for such functions as obtaining and servicing customers, purchasing and installing decoders, and obtaining programming, either from a pay "network" such as HBO or by individual deals with producers. The latter is referred to as a "self-booked system" and has been the more prevalent form of program procurement for STV operators. For a general discussion of industry structure of STV, see K. Glen, *Report on STV*, Appendix to Network Inquiry Special Staff, Federal Communications Commission, *Preliminary Report on Prospects for Additional Networks* (January 1980) (hereafter *STV Report*).

[41] The FCC's jurisdiction to impose these regulations under title III was upheld in *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), cert. den. 397 U.S. 922 (1969) (hereafter *NATO*).

[42] *Fourth Report and Order in STV*, 15 FCC 2d at 529, 47 CFR §73.642(a)(3) (1979).

[43] *Ibid.* at p. 531, 47 CFR §73.642(a)(3) (1979).

[44] *Ibid.* at pp. 525–26, 47 CFR §73.643(a) (1979).

[45] *Memorandum Opinion and Order re Section 21.703(g)*, 47 FCC 2d 957 (1970).

[46] These were virtually all of a technical nature and essentially irrelevant to the concerns of this article. For a full discussion of MDS regulations and industry structure see K. Glen, *Report on MDS*, Appendix to Network Inquiry Special Staff, Federal Communications Commission, *Preliminary Report on Prospects for Additional Networks* (January 1980) (hereafter *MDS Report*).

[47] *Amendment to FCC Rules, MDS*, 34 FCC 2d 719 (1972).

[48] Additionally, and perhaps most controversial in the overall context of telecommunications regulation, the FCC has proposed new procedures — lotteries, auctions, or paper hearings — as alternatives to oral comparative hearings in selecting among competing, mutually exclusive applicants for MDS licences. These alternatives, or any one of them, if adopted, would enormously reduce the time between application and authorization.

[49] See discussion of multi-tiers below.

[50] This is unlikely, but MDS is often seen as "pre-softening" an unwired area for cable and/or preventing STV, with its higher start-up costs, from gaining a foothold. This, for example, is the case in certain uncabled boroughs of New York City where HBO is the MDS operator with franchises who are bound to discontinue their MDS operations if and when the parent company is granted a cable franchise. See generally, *MDS Report*, pp. 102–3.

[51] The New York State Commission on Cable Television had attempted to place significant burdens on MATV transmission of MDS for the stated purpose of eliminating or curtailing MDS as a competitor of pay cable. The reason, of course, was because municipal or state franchising agencies receive a percentage of the gross

revenue of cable systems, and nothing from MDS — or STV — operations. The FCC has, however, twice struck down such state regulation.

[52] *Midwest Corp. Microwave Relay Services, Inc.*, 38 FCC 2d 897 (1973) *reconsideration den., Midwest Corp. and Two-Way Radio of Carolina, Inc.*, 53 FCC 2d 294 (1975).

[53] See, for example, *Notice of Rulemaking*, 20 *Federal Register* (1955), 988, *First Report and Order in STV*, p. 543 where there had been *no* STV system ever in operation.

[54] See, for example, the discussion of the effect of the Commission's programme exclusively rules on pay programming in *Report and Order in Docket 20402*, 41 RR 2d 839 (1977) *aff'd. Home Box Office, Inc.* v. *FCC*, 587 F.2d 1248 (D.C. Cir. 1978) ("HBO II"), or of the effect of the one to a community rule for STV in *First Report and Order in Docket 21502*.

[55] This concern extended, in its most extreme manifestation, to a fear that conventional television stations might actually be driven out of business. It was this fear, with regard to struggling UHF and educational stations, which analogously provided the basis for the Commission's jurisdiction to regulate the importation of distant signals by CATV operators. See *United States* v. *Southwestern Cable Co., supra*. However, because this article is not concerned with restrictions on non-pay cable programming, it will not discuss the various restrictions on non-pay cable transmission of broadcast signals, such as 47 CFR §§76.5, 76.51–76.65 (signal carriage), 76.92, 76.151–153 (non-duplication protection and syndicated exclusivity).

[56] See discussion below.

[57] While the anti-siphoning rules ultimately adopted for both STV and cable dealt only with the possible diversion of programmes, the Commission's initial concern included possible diversion of talent as well, that is, pay-TV might not only take the World Series, or other sports events from conventional television, it might take "Uncle Miltie" as well! In the *Fourth Report and Order in STV*, the Commission concluded that

> it does not appear to us that rules to prevent siphoning of talent are necessary to achieve the end of assuring adequate quantity and quality of free TV to the public, at least at this time. However, we would view with a jaundiced eye unreasonably restrictive contracts on the part of either STV or free TV with talent that would prevent the latter from performing on or otherwise serving the other service (p. 572).

[58] Interestingly enough, the rules ultimately adopted were not those on which the Commission had primarily sought comment. Its initial proposals included:

> (1) Rules preventing or limiting interconnection of pay TV operations by microwave or otherwise; (2) rules prohibiting a system manufacturer or franchise-holder (who might hold franchises in numerous markets) from engaging in subscription program procurement and supply, which could be made the responsibility of the individual licensee; or (3) rules to assure that subscription television entrepreneurs do not unreasonably contract with performers in such a way as to prevent or discourage their appearing on conventional television. *Further Notice of Inquiry*, para. 14 cited at 15 FCC 2d (1968–69), 495, no. 34.

It was Zenith who suggested "another approach" "that subscription television be limited to *kinds of programming* not presently available in substantial amounts on conventional TV." *Ibid.* (emphasis added)

[59] *NATO*, p. 198.

[60] The feature film rules were Byzantine in their complexity. Briefly, however, they prohibited STV operators from showing feature films unless they had been a general theatrical release for more than two years, with an exception for films that could not be sold, for one or another reason, to conventional "free" TV.

[61] The sports rules, including many definitional problems, were equally Byzantine. They generally prohibited the broadcast by STV operators, of sports events that had been regularly televized in the community by free TV during the previous two years.

[62] 47 U.S.C. §326 prohibits the FCC from engaging in "censorship" of broadcast programming.

[63] *Memorandum Opinion and Order in Docket 18397*, 23 FCC 2d (1970), 825.

[64] *Notice of Inquiry and Notice of Proposed Rulemaking in Docket 19671*, 39 FCC 2d (1973), 527.

[65] *First Report and Order on Cablecasting and Subscription TV Rules*, 52 FCC 2d (1975), 1. Again, in much abbreviated and simplified fashion, the rules

1. Permitted cable systems and STV to show movies up to three years old instead of two years, as under the former rules
2. Permitted the local showing of movies that were three to ten years old if they were under non-exclusive contract to the local television stations
3. Permitted the showing of movies over ten years old if they had not been shown on local television during the preceding three-year period
4. Extended protection of specific sports events to five, instead of two years
5. Permitted pay operators to show a specified percentage of non-specific sports events (e.g., all home baseball games)
6. Permitted pay operators to show series programmes not previously broadcast on conventional television.

[66] This is the Court, one of eleven Courts of Appeals directly below the U.S. Supreme Court in the U.S. federal appellate system, that reviews most administrative agency rules and decisions, including those of the FCC.

[67] 567 F.2d 9 (D.C. Cir.) cert. den., 434 U.S. 829 (1977).

[68] The Court found the rules did not fall within "reasonably ancillary" standards discussed above.

[69] The Court held that the Commission had failed to adequately document its two basic assumptions:

1. That siphoning would in fact occur
2. That it would be injurious to the public interest since it would lead to the loss of sports and movie programming for audiences not served by CTV systems or too poor to subscribe to pay cable.

Further, it found that the Commission's underlying position that cable must be "a supplement to, rather than an equal of, broadcast television" was in no way justified.

[70] *Memorandum Opinion and Order in Dockets 18893 and 19554*, 42 *Federal Register* (1977), 64348.

[71] *Reports and Orders in Docket 21311*, 42 *Federal Register* (1977), 62372, 43 *Federal Register* (1978), 15322, 15323.

[72] The Network Inquiry Special Staff has written:

> The Commission presently faces a clear choice. It can attempt to deal with network dominance through what we regard as a vain search for the effective regulation. Or it can try to deal with the source of that dominance by reducing or eliminating regulatory barriers to the entry of new networks. . . .
>
> ...[new technology] entrepreneurs, freed of the burdens of regulation, have responded by offering an expanded array of services to television viewers. . . .

New Television Networks: Entry, Jurisdiction, Ownership and Regulation, pp. 29, 32. The staff concludes that the new technologies, including the pay services, should be allowed to develop in an essentially unfettered and unregulated fashion.

[73] Various citizens' groups in the United States involved in communications and media reform including the National Citizens Committee for Broadcasting (NCCB), the National Black Media Coalition, the National Organization for Women ("NOW"), Communication Project, the Telecommunications Consumer Coalition (which includes organized labour and religious groups among its hundred or so participants), have opposed this policy as what they consider no more than a "give-away" of the publicly held airwaves.

[74] For example, the National Association of Independent Television Producers and Directors ("NAITPD") has opposed the Network Inquiry's findings and strenuously argued that an increase in outlets does not necessarily mean — and thus far has not at

all demonstrated — an increase in the quantity or quality of programming available to viewers or on the drawing boards. See *Comments of NAITPD on Special Staff Preliminary Reports*, Docket No. 21049, September 1980. (*NAITPD Comments*)

[75] For example, in comments solicited by the FCC as it considers how and if to implement and regulate a domestic DBS service, the Justice Department thinks "marketplace regulation" would, in most instances, be adequate, while industry groups like the National Association of Broadcasters (NAB) "questio[n] the public need or desire for DBS Services" and urge the FCC to defer further consideration at least until after the Regional Administrative Radio Conference (RARC) in 1983! See *Broadcasting* (11 May 1981), pp. 58–59.

[76] Over a twenty-year period in the 1940s and 50s, Justice Felix Frankfurter of the U.S. Supreme Court wrote a series of decisions, explicating the 1934 act, that, at least until recently, have been seen as the definitive construction of that legislation. In *FCC* v. *RCA Communications, Inc.*, 346 U.S. (1953), 86 he wrote:

> The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications (p. 93).

[77] See, for example, "Mark Fowler's Emancipation Proclamation for Radio-TV," *Broadcasting* (15 June 1981), pp. 27–28.

[78] See *STV Report*, pp. 98–100 and *Multicast* (30 May 1979).

[79] See *MDS Report*, pp. 102–5.

[80] *Multicast*, fn. 21.

[81] *Multichannel News* (8 December 1980). Three additional stations have begun operating since that time. The leading industry analyst, Paul Kagan, projects 1.4 to 1.6 million subscribers by the end of 1981.

[82] *MDS Report*, p. 105.

[83] The only control left in this area of cable is the FCC's prohibition on broadcast networks owning cable systems. There are, as previously stated, no limitations on numerical ownership of cable systems, nor are there any analogues for cable multiple systems owners to the various restrictions on programme syndication or non-network exhibition rights that limit broadcast networks.

[84] See, e.g., *STV Report*, pp. 67–69; *MDS Report*, Exhibit H, "Media Cross-Ownership of MDS Licensees and Marketers," p. 5; "Media Concentration: Conglomerates Take Cable's Bait," *Cablevision* (15 December 1980), pp. 128, 139 (hereafter "Media Concentration").

[85] *MDS Report*, Exhibit H, p. 6.

[86] Benjamin M. Compaine *et al.*, *Who Owns the Media* (White Plains, N.Y.: Knowledge Industry Publication, 1979), pp. 314–15.

[87] This situation may soon change. The FCC has been petitioned to eliminate all cable cross-ownership rules that prohibit broadcasters from owning co-located systems, and networks from owning any cable systems at all. *Broadcasting* (22 December 1980). ABC has recently petitioned for "immediate consideration" of the pending petition, and it is not yet clear how the FCC will respond. *Broadcasting* (18 May 1981), pp. 31–32.

[88] RCA (owner of the NBC radio and TV network) has recently joined CBS and ABC in production for cable, and is directing its energies into a pay distribution system that has already acquired first-run pay cable rights to new BBC TV products in the United States. See *Broadcasting* (11 May 1981), p. 23. RCA is also substantially involved in videodisc and satellite transmission.

[89] See, for example, Carey Winfrey, "The Cable TV Revolution: How It Affects the Arts: Opportunities Knock for Performers and Producers," *New York Times* (5 July 1981), section 2, p. 1.

[90] See, for example, Price-Root, "Pay Television: Can It Deliver What It's Promised," *EMMY (The Magazine of the Academy of TV Arts & Sciences* (Winter 1980), p. 45.

[91] Tiering can only occur with pay cable because it is the only service with multi-channel capacity.

[92] J. Lisanti, "Multipay Update: Still No Answers," *VIEW* (June 1981), p. 87.

[93] At the recent National Association of Television Production Executives (NATPE) Convention, there was general consensus that pay-TV will have substantial repercussions in the pricing of programmes, and particularly the availability of feature films for conventional broadcast television. "New Media, New Marketplace," *Broadcasting* (23 March 1981), p. 74.

[94] Gordon, "Syndication: Is It Real?" *VIEW* (May 1981), pp. 27, 28.

[95] The major supplier of the largest pay programming service, HBO, has been candid about the lack of innovation. Michael Brandman, a former HBO executive, now supplier, is quoted as having said,

> If I had to describe what I would choose to make, it would be a box-of-popcorn type of show — entertainment for the whole family. I don't think pay-TV is going to be more creative than network television — in the end it's still television.

Price-Root, "Pay Television," p. 56.

[96] After interviewing producers, syndicators, and pay and broadcast executives, one reporter concluded,

> If programs created for pay television are being developed with syndication in mind, the same restrictions that fall on broadcast television will haunt cable — how to attract the broadest possible audiences.

Gordon, "Syndication," p. 48.

[97] Bravo is the first and presently the only operative one of several proposed cultural pay services. It was launched in December 1980 and presently has approximately 100 000 subscribers who are charged $8 per month. Winfrey, "The Cable-TV Revolution," p. 22.

[98] See, for example, M. Friedman, "PTV's Fund-Raising Methods Proliferate and Draw More Fire," *Television/Radio Age* (22 September 1980), p. 41. The general manager of one public television station has stated,

> "I would guess that, within the next three-to-five years, you may see some of the larger public television stations spinning off their stations into separate corporations. In effect, all they would have to do is transfer the license to some other group that met FCC requirements to hold the noncommercial license."
>
> Then he believes, these new entities will "do whatever they can" to produce profitable programming for all segments of the merging video marketplace. "The new technologies have already started encroaching to the point whereby, unless public television dramatically changes its approach to doing business in a hurry, it cannot survive as a system, and five-to-10 years from now, we may find it virtually disappearing" (*Ibid.*, p. 73).

[99] The Public Broadcasting System's (PBS) proposal for a pay "Public Subscriber Network" (PSN), approved by the Public Broadcasting Service and the National Association of Public Television Stations, provides that "cultural programming offered on PSN would be made available to PBS at a later date." "PBS's Cultural Service Plan Moves Closer Toward a Reality," *Cablevision* (9 March 1981), p. 17.

[100] The executive director of Global Village, one of the United States' most innovative independent production groups, has predicted precisely this. He states:

> The fact that public television is not developing new material and not embracing the independents wholeheartedly may put them in trouble. What's going to happen in three years when cable penetration is above one-third and when the large cable networks are strong enough to go directly to *Live From Lincoln Center* and *Live From the Met* and outbid public television for the rights to telecast these presumptive cultural staples of public broadcasting? I suspect that many of the programs that public television has depended upon may ultimately go with the cable operators.

Friedman, "PTV's Fund Raising Methods . . . ," p. 72.

[101] *Cablevision* (May 11 1981), p. 50. Fifty per cent of ON TV's subscribers took each of the fights offered, returning $1.28 and 2.4 million respectively to the STV operator. *Ibid.*

[102] With 30 per cent pay penetration (which is projected, but not now realized), and 50 per cent of pay subscribers taking a particular event, a charge of several dollars would be adequate to outbid the networks, who generally pay only several cents per viewer, for any major event.

[103] It is clear that sports generate social by-products or "externalities" that create a separate public good beyond their entertainment value. Consider the importance of hockey as an activity that connects Canadians of all classes; consider the building of national pride and self-image in a Canadian Stanley Cup victory or perhaps even, in another field, one in the World Series.

[104] See R.B. Woodrow, K. Woodside, H. Wiseman, and J.B. Black, *Conflict Over Communications Policy: A Study of Federal-Provincial Relations and Public Policy* (Montreal: C.D. Howe Institute, 1980), p. 14.

[105] There are beguiling promises of more effective decentralization and specialization in the provision of services to meet human needs and of increased opportunities for the expression of creative talent. *Ibid.*, p. 27.

[106] The National Association of Independent Television Producers and Directors summed up the dangers of a total reliance on new technologies as follows:

> Broadcasting is not just about sending and receiving ideas; it is, in its essence, about having them; and the new technologies on which the [FCC] relies have already been with us long enough to demonstrate that hardware does not breed software. . . . Nor could it be rationally supposed that they would. The marketplace consequences of new technologies are not ideas; they are dollars. Efficiency . . . governs the unregulated marketplace and it is inefficient to pay for the creation of a new product for sale when the preexisting product can simply be sold in a different way.
>
> ...New delivery systems . . . lead to new deliveries; so long as there is a market therefore but they do not lead to new programs unless they have to. And since government — through . . . deregulation . . . has actually gone in the opposite direction by actually providing further economic incentives for following the natural marketplace tendency to simply resell the old, it is a certainty that new technologies cannot supplant the diversity mandate [of the Communications Act]. Rather, insofar as they limit their activity to redistribution of the existing broadcast "product" they can and will serve only to impede, the diversity mandate. (*NAITPD Comments*, pp. 17–18.)

A Commentary on the CRTC Licensing Decision of 18 March 1982

On 18 March 1982, the Canadian Radio-television and Telecommunications Commission (CRTC) issued its long-awaited decision on the licensing of pay-TV services, which are to begin operation across the country early in 1983. The decision, which was subsequently confirmed by Cabinet two months later, came as the culmination to a decade-long debate over the introduction of pay-TV in Canada and the immediate outcome of an intense contest among eager applicants for the right to provide such services. The decision itself is a complex one and, in several respects, strikes out in new and interesting directions. It represents a deliberate but belated attempt on the part of the Commission to impose some degree of order on the introduction of an important new communications technology and to influence the shape of the emerging pay-TV industry and its inevitable impact on the existing broadcasting system. Initial commentary on the decision, often advanced by those most directly affected by the issue, has tended to be negative, focusing for the most part either on an alleged excess of competition injected into the pay-TV market-place or the relative weakness of safeguards to ensure the predominance of Canadian programming.[1] Nevertheless, even its critics acknowledge that the decision does have its own "internal logic," however much there may be serious doubts about its broader economic rationality and political feasibility.[2] Each of these criticisms, along with an additional line of argument that focuses on the proper role of the CRTC in the introduction of new technology, will be examined in terms of that "internal logic" and the evolving conditions in which the decision is being put into effect. It is our view that while the CRTC has made a valiant attempt to combine pressures for competition with continuing cultural regulation and to accommodate both to rapid technological change, there continue to be disturbing implications to the way in which pay-TV is being introduced in Canada.

The "Internal Logic" of the CRTC Decision

The CRTC decision must be examined not only as the particular outcome of a particular exercise in regulatory decision making but also in relation to the direction set out by the Commission in its April 1981 "Call for Applications" and other recent actions by the CRTC on related issues in the communications field. In what the Commission euphemistically referred to as "the call," it had already put forward a set of goals for the introduction of pay-TV in Canada and also raised several pertinent considerations and strong caveats to guide those proposing to submit applications. Its three basic goals for pay-TV were as follows: "realisation of the objectives set out in the Broadcasting Act"; an "increase [in] the diversity of programming available to Canadians"; and, most importantly, support for "high quality Canadian programming from new programming sources by providing new opportunities and revenue sources for Canadian producers currently unable to gain access to the broadcasting system."[3] Among the considerations and caveats that it outlined were such matters as a clear preference for discretionary as opposed to universal pay-TV service, an interest in receiving applications for regional as well as national systems, concern about cross-ownership between prospective distributors and those likely to be involved either in the production or exhibition functions, the high premium placed on "commitment to Canadian programming" as measured by some unspecified combination of viewing time, programming purchased and revenues diverted to the domestic production industry, and the Commission's unwillingness to consider the transformation of existing broadcasting enterprises into "super-stations" or to permit advertising support for pay-TV. Looking backwards, the forthright specification of these goals would seem to represent, in effect, the CRTC's initial best judgement as to the economic rationality and political feasibility of introducing pay-TV in Canada, and its various considerations and caveats provide important clues to its assumptions about what shape the eventual decision would take.

The Commission received a total of 53 licence applications prior to its July deadline for submissions, chose to examine 27 of these applications in detail, and received over 350 representations from individuals and groups concerned about various aspects of the introduction of pay-TV in Canada.[4] Of the 27 applications proceeded with, 7 were designed to provide mass-appeal pay-TV services on a national basis, 11 were for similar services in particular regions of the country, and the remainder proposed various specialized services such as cultural, sports, or multilingual programming. Each of these applications was initially subjected to close scrutiny and assessment by the Commission and its staff, extensive public hearings were conducted during September and October, and the Commission then extended its deliberations well beyond the end-of-the-year target it had tentatively set for itself in rendering its decision. When the 18 March decision was finally handed down, it became clear that the pay-TV licensing decision had constituted a most difficult exercise in regulatory decision making, both from a technical and a political standpoint, and the fact that the decision contains an unusual and important "minority decision" is only the most visible mark of the struggle that took place.

While it is not possible at this time to explore the intricacies of this exercise in regulatory decision making, it is evident that the majority of the Commission continued to hold by and large to their original thinking on the introduction of pay-TV in Canada. Only with regard to the possibility of universal in addition to discretionary services as well as minor compromises in the area of cross-ownership does the Commission appear to significantly modify the views that it set out in "the call." Significantly — and seemingly with the concurrence of its dissenting members — the Commission restated the "major objectives" set out for the introduction of pay-TV in Canada somewhat more coherently but virtually in the same terms:

> The Commission considers the major objectives for pay television to be as follows. It views pay television as an integral part of the Canadian broadcasting system which should play an important role in achieving the objectives of the broadcasting policy for Canada set out in Section 3 of the Broadcasting Act. Through its capacity to generate revenue, pay television should contribute significantly to the broadcasting system by increasing the diversity of programming available to all Canadians from coast-to-coast and by enhancing the quality and distinctiveness of Canadian programs. Pay television should provide new opportunities and revenue sources for the program production industry in Canada, particularly for producers currently unable to gain access to the broadcasting system. Pay television should also provide new opportunities for developing programs that reflect the various regions of Canada and should provide new programming in both official languages.[5]

As such, these "major objectives" serve both as bench-marks against which individual licence applications were adjudged and as longer-term criteria on which the overall decision and its various features can be evaluated.

With regard to the actual granting of pay-TV licences, the Commission assessed each of them in terms of the aforementioned goals and considerations and concluded candidly that "none met them fully."[6] Therefore, adopting what must be taken as a second-best solution and presenting it as merely a "first step" toward the evolution of "a distinctively Canadian pay television system," it decided to license a total of six discretionary pay-TV services: "one national general interest service, three regional general interest services in Atlantic, Central and Western Canada, one national speciality (performing arts) service, and one regional multilingual service."[7] Beyond these initial six licences, the Commission noted "the lack of a regional French-language service for Quebec, Ontario and Atlantic Canada" and its unwillingness to license "either of the general interest service applications proposed for British Columbia" and indicated that it would subsequently call for applications for further regional general interest services in both of these areas.[8] More surprisingly, the Commission indicated that it had "found persuasive" the various arguments advanced by supporters of universal pay-TV service, and while unwilling to license any such service at that time, it did declare its intention to consider non-profit proposals at future public hearings on "the appropriate allocation of various types of cable services among available channels and the related matter of service tiering."[9] Finally, the Commission acknowledged the possibility of "other specialty pay television services designed to suit the interests of particular audience groups" and indicated it might subsequently license such services either on an experimental basis or through "channel-sharing arrangements" with the successful licensees.[10] Such is the blueprint that the CRTC outlines for the introduction of pay-TV in Canada.

The particular "regulatory approach" adopted by the Commission for pay-TV is also relatively straightforward but significant. At least for the initial years, it has prescribed "three classes of pay television network licences": "general interest" licences, which can be granted on a national or regional basis, and are to consist "predominantly of feature films, variety, and dramatic programs"; "specialty (performing arts)" licences, which provide specialized programming in a particular area like the performing arts but could presumably refer to other areas such as children's or sports programming; and "multilingual" licences, which are specified as having "not less than 60% of the total programming time devoted to programming in languages other than English, French or a native Canadian language."[11] In line with these categories, the Commission then proceeded to grant a multiplicity of pay-TV licences and to create a form of structured competition between national and regional licences operating in separate markets across the country and, to a lesser extent, among "general interest" and more specialized licences. This structured competition is designed to operate not only in the marketing of these services to prospective subscribers but also in the acquisition of programming; as well, it is reinforced by the Commission's commitment to a separation within the emerging pay-TV industry between those involved in its major functions and by the absence of any explicit regulation of retail rates. At the same time, the Commission has also chosen to superimpose an intricate pattern of cultural regulation aimed at encouraging Canadian programming and strengthening the domestic production industry. Through the imposition of a specific French-language requirement on the major national distributor, through the establishment of progressively rising Canadian content regulations on all but the multilingual licence, and through the specification of percentages of revenue and expenditure that must go to Canadian programming each year, the Commission has sought to meet its major cultural objectives. And finally, with regard to such matters as possible unfair practices in programme acquisition or exhibition arrangements, the Commission expressed its willingness to act "in those areas where the Commission has expressed its concerns . . . but where no regulations or conditions have been prescribed at this time" and, further, to "consider denial of applications to renew the licences of those who have failed to contribute to the achievement of the Commission's objectives for pay television by reason of their non-compliance with the conditions of their licences."[12]

Looking more closely at the individual licensees and their conditions of licence, the Commission has been judicious and deliberate in its selection of bricks and mortar, choosing those applications that most closely fit its objectives and considerations and prescribing changes in those applications where they were deemed deficient. The selection of First Choice Canadian Communications over its six other competitors for the national general interest licence seems to have been made for several reasons. The Commission was impressed by the "talent and experience" of its management team and an ownership structure that includes backing from several major Canadian companies, by its elaborate plans for English- and French-language programming, by its willingness to accept higher levels of Canadian content and funding for the domestic production industry than other applicants, and by the absence of cross-ownership ties to those involved in the production or exhibition functions. However, the Commission was clearly not satisfied with First Choice's proposal for both a full English-language pay-TV service and a separate "checkerboard" bilingual service to be offered across the country but with only the latter being available in Quebec. With the subsequent agreement of the company, the Commission therefore required First Choice to operate a separate and entirely French-language service parallel to its English-language service, at least for its first two years or until a regional French-language service could be licensed, after which, it left the impression, First Choice might be allowed to return to its "checkerboard" proposal.[13] Moreover, as a specific condition of licence, the CRTC required that First Choice initially devote 30 per cent (rising to 50 per cent in 1986) of both its total scheduled programming and its prime-time programming to Canadian content, that not less than 50 per cent of that Canadian content time be devoted to dramatic programmes, and that the company spend annually 45 per cent of its total revenues and 60 per cent of its total expenditures on the acquisition of Canadian programming.[14] Burdened down with a full French-language requirement and operating in a competitive rather than a monopoly situation, First Choice does not appear to be in the vanguard position it once anticipated.

The three regional general interest licences went to Alberta Independent Pay Television operated by Allarco Broadcasting Limited of Edmonton; Ontario Independent Pay Television, which is its sister operation in Toronto; and Star Channel Services Ltd., which is to provide pay-TV service in the Atlantic provinces. The common theme running through the CRTC's licensing of regional operators was its approval of their commitment to use creative talent and production facilities within the region and in this way reflect the diversity of the country. As well, the Commission also noted the probability that the regional services would likely place particular emphasis on local sports programming and special events in addition to its normal fare of feature films and other presentations. Because each regional licence would be competing with the national service within its area of operation, the CRTC imposed the same Canadian content requirements as a condition of licence as for First Choice. As well, the Commission gave some indication of both its expectations and concerns about each of the regional licensees. With regard to Alberta Independent Pay Television, it referred approvingly to its promise to direct 100 per cent of company profits over the first five years to the independent Canadian production industry and to direct 20 per cent of its production budget into regional programming but, at the same time, made clear that the licensee, whose parent Allarco owns its own production facilities, would not be allowed to produce pay-TV programming for its own use.[15] In the case of Ontario Independent Pay Television, whose principal figures were also associated with Allarco, the Commission made it a specific condition of licence that two thirds of the company's board of directors be Ontario residents but otherwise praised the licensee's plans to spend 20 per cent of its production budget on joint ventures with other regional distributors and its similar promise to direct 100 per cent of company profits to Canadian producers.[16] Turning to the third regional licensee, Star Channel Services under the direction of Finlay MacDonald of Halifax, the Commission was seemingly impressed by its plans for regional programming and the development of an Atlantic-region production industry and encouraged by promises of its intention "to co-operate with other regional licensees in the production, acquisition and exchange of programs that express and interpret the distinctive experiences, characteristics and lifestyles of each region and strengthen regional creative resources and production facilities."[17] Looking ahead, the three regional licences — to be joined later by others in all likelihood — constitute potentially another national network of pay-TV services but a different kind of national organization than First Choice.

Apart from the national and regional general interest licences, two other pay-TV licences were granted. One was a national performing arts licence given to Lively Arts Market Builders Inc. (LAMB) operating out of Toronto. This service is literally in a category by itself, at least for the moment, and would be offered as a more specialized "cultural channel" in addition to any general interest service or services the subscriber might take. The CRTC clearly viewed LAMB as offering both the potential for innovative and diversified programming in theatre, music, and dance as well as opportunities for Canadian performing artists who might not otherwise gain exposure on pay-TV. In order to hold LAMB to its stated purposes but in recognition of its "speciality" nature, the CRTC attached, as conditions of licence, provisions that at least 30 per cent of total and evening programming time consist of, or relate to, the presentation of performing arts and that the number of feature films be limited to a maximum of 40 per cent of programme time, only 5 per cent of which can be recent film hits and not more than half of which can be non-Canadian films coming from any one country. However, the overall Canadian content requirements are somewhat reduced in the case of LAMB *vis-à-vis* general interest services, prescribing 30 per cent up to the end of 1985, but only 40 per cent rather than 50 per cent thereafter. As well, other conditions attached to the LAMB licence were that 50 per cent of total expenditures and 20 per cent of total revenues go towards investment in the purchase of independent Canadian programming.[18] LAMB thus represents an important first test of the market for specialized programming, although even here the conditions of licence only require that about one third of its programming fall into the performing arts category.

The sixth licence also fits into a category of its own — multilingual pay television — and was granted for a regional service to be provided by World View Television of Vancouver. The Commission was apparently persuaded of the need for multilingual programming to serve the various linguistic communities of the West Coast and, contrary to its position on the other licences, was impressed by World View's plans to produce much of its own programming. In order to reinforce the commitment of multilingual programming, the Commission set as a condition of licence that at least 60 per cent, rather than the proposed 43 per cent, of total and evening programme time be devoted to programmes in languages other than English, French, or native Canadian languages and, further, that not more than 25 per cent of the time devoted to the latter consist of feature films.[19] Nevertheless, the granting of this licence remains somewhat puzzling because the CRTC had previously licensed multilingual operators like

CFMT-TV in Toronto as conventional broadcasters rather than on a discretionary basis, while the Commission refused at the same time to license other applicants for multilingual pay-TV services in the Toronto-Hamilton area owing to possible disruption of the existing broadcasting system. What this would seem to indicate is some ongoing redefinition of the area of multilingual television and possible treatment in future as a discretionary service.

Lastly, it is important to examine the "minority opinion" rendered by two members of the Commission — Commissioners Gagnon and Grace — who ultimately found it necessary to dissent from the pay-TV licensing decision. They commended their colleagues for "an almost heroic effort to reconcile competing goals," but were forced to conclude that "specific, crucial elements of the licensing decision taken by the Commission will add dangerously to the difficulties of the pay television enterprise."[20] Those in dissent set out three main lines of argument. First of all, they were critical of "the decision to license First Choice on the basis of its substantially changed French-language service" as "unfair to competing, unsuccessful applicants, particularly where the changes have been made by the Commission itself." While agreeing that First Choice's original "checkerboard" proposal was unacceptable, they argue both that it was improper for the Commission to impose a full French-language requirement on the successful applicant and that any future regional French-language service which might be licensed "cannot be allowed to supplant a national service." As the dissenters pointedly observe, "the concept of territorial bilingualism has been discredited and should not now be reintroduced by a regulatory decision."[21] Secondly, they objected to the Commission's resurrection of the possibility of subsequently licensing universal pay-TV service in addition to the substantial number of discretionary services already being licensed. The dissenters viewed such a universal pay-TV service as "a new CBC without commercials: an ill-timed, expensive luxury in two languages for which no public demand has been demonstrated" and questioned whether the Commission has "the authority to impose what could well be construed as a tax by another name in forcing a payment for made-in-Canada pay television." Even more to the point, however, they were concerned that the addition of universal service would have "a deleterious, if not devastating, effect upon the discretionary systems licensed by this Decision."[22] Finally, those in dissent raised the pertinent question as to whether or not the Commission might be licensing "too much pay." They pointed out that Canada will be "transformed within a short time from a no-pay television situation to a country with national discretionary pay television, a full system of regional pay television, specialty pay television, multilingual pay television, not to mention universal pay television." In particular, they "find unconvincing" the case for a full system of regional pay-TV services, arguing that the regionals "could well be construed as 'mini-nationals' without more onerous marketing and bilingual programming requirements which the national licensee, competing directly with these regionals, must support" and, even more acerbically that "Canada's population and resources [cannot] support significant production centres outside Toronto and Montreal." In their own words, the dissenters pose the fundamental question as to "How many of these birds will fly?"[23] Like all good "minority opinions" emanating from judicial or quasi-judicial proceedings, this important and cogently argued dissent serves as a "loaded gun" aimed at the "internal logic" of the CRTC decision.

The Technological Factor

Perhaps the least obvious, but not least important, feature of the CRTC decision is the extent to which pay-TV has been recognized as a new technology in its own right. Evidence on this point is mixed but becomes more starkly apparent if one reflects, hypothetically of course, on the kind of decision the CRTC might have rendered at an earlier date. Had the Commission decided to introduce pay-TV in 1976 or even 1978, it is likely that the outcome would have been a single national pay-TV network, probably operated by the cable companies but, perhaps in partnership with public and private broadcasters, a comprehensive premium service under regulated monopoly conditions, with specific Canadian content requirements, and utilizing a relatively low-level technological capability. By way of contrast, the 1982 CRTC decision is considerably more complex and represents a conscious attempt to create a structure for the emerging pay-TV industry in Canada and to fit it into the broader Canadian cultural context. In terms of its appreciation of the technological factor, however, the recent CRTC decision fails somewhat in its attempt to marry the traditional concerns of broadcast policy to the rapidly changing and alternative technologies and must be given only a mixed review.

What is missing from the CRTC decision and related pronouncements in recent years is any clear and convincing conception of pay-TV as a new and potentially autonomous technology in the communications field. Perhaps understandably in terms of its narrow mandate under the Broadcasting Act and the absence of government policy direction to the contrary, the CRTC recognizes the pay-TV entreprise as something different than conventional broadcasting (including cable) but persists in treating it primarily as an extension of the existing broadcasting system. Its normative statements scattered throughout the decision, which describe the introduction of pay-TV as providing "a new and unique contribution to the Canadian broadcasting system," as an opportunity for developing "innovative and imaginative programming," and as being "distinct from the American model," simply confirm this orientation. The implicit position taken by the CRTC draws a distinction between pay-TV as a programming service to be delivered primarily by cable and the increasing variety of non-programming services like videotex, remote sensing, and transactional services that can be offered using essentially the same technology. Its explicit regulatory approach to the introduction of pay-TV in Canada is described as "evolutionary," suggesting commendable flexibility in allowing the emerging pay-TV industry to develop on its own initiative but also raising fears that the Commission has no fixed view as to how pay-TV should necessarily develop in Canada and how it relates to broader developments in the communications field. In short, while no one would expect the Commission to descend into technological fetishism or to adopt the glib social science jargon of the "information society" or the "electronic highway," the CRTC decision would be somewhat more reassuring if it offered or were accompanied by some discussion of the potentiality of pay-TV as a new technology in the communications field.

Within its own more narrow terms of reference, however, the CRTC decision should be given credit for recognizing and confirming the often invoked principle of separation of content from carriage as a basis for ordering the emerging pay-TV industry in Canada. The cable companies, which pressed so hard for pay-TV, have been restricted to the role of exhibitor alone, contracting with the distributor for those services that they feel will be attractive to their subscribers (or potential subscribers), delivering those services, and collecting the premiums due in return. The much-coveted distribution licences, which involve the actual purchase, scheduling, and promotion of pay-TV programming, were granted to new commercial entities not directly connected to either the cable industry or the broadcasters, and it is these companies that will spearhead the introduction of pay-TV in Canada. And the domestic programme production industry, whose survival and good health became an important *leitmotiv* behind the final decision, has been given assurance of protection against predatory action on the part of the distributors but not the kind of revenue guarantees and Canadian content restrictions that may be necessary to ensure its future. In theory, as well as in practice, the CRTC has used the principle of content/carriage separation to establish a working separation of power within the emergent pay-TV industry.

By default if not by design, the Commission has also mandated the adoption of a more technologically sophisticated pay-TV system than would have been likely even a few years previous. First of all, by licensing a number of different services to operate in each pay-TV market-place, the Commission has made it necessary to consider the appropriate allocation of scarce cable channels for the provision of such discretionary services and, along with its open-ended categorization of "classes of licences," has implicitly accepted some notion of "tiered service." Exactly how extensive the menu of pay-TV services offered to the subscriber will be and whether it will be combined with other non-programming services like videotex and teleshopping must await further public hearings and deliberations by the Commission. Secondly, there are clear indications that the major cable companies, which are the most likely exhibitors of pay-TV services and are presently gearing up for their introduction in 1983, are tending to adopt the more rather than less sophisticated technology for delivering these services to subscribers. Instead of using simple "negative traps" to get pay-TV services into the home, they are investing in more elaborate "black box" technology that can be utilized to eventually provide a wide range of programming and non-programming services. Finally, although the CRTC decision acknowledges it indirectly, there is little firm evidence that the Commission recognizes that the pay-TV system presently being put in place will inevitably be challenged by other quick-breaking technological developments in the communications field. The rapid growth and increasing popularity of video recording and playback technology, whether on a purchase or rental basis, offers a rudimentary but unregulated alternative to prospective pay-TV services, and the Commission seems both unprepared and powerless to deal with it. As well, the sooner-than-expected advent of direct-to-home satellite reception in the United States and perhaps in Canada provides yet another potent technological challenge to the pay-TV system presently being put in place by the Commission and something that will eventually have to be faced.

At a more general level, what all this suggests is the need to reassess carefully the proper role of the regulatory authority in the introduction of a new technology. In deciding upon the pay-TV system that is presently being put into place in Canada, the CRTC has sometimes shown considerable skill in dealing with the technological factor but in other respects can be criticized for a certain degree of myopia with regard to the broader pattern of technological development. This mixed review can be explained in part by three prime contraints on the role of the CRTC as a regulatory body involved in the introduction of a new technology. First of all, the Commission must operate squarely within the confines of the Broadcasting Act, which hardly provides the most congenial context for the introduction of pay-TV. Secondly, the Commission was clearly aware of the uncertain constitutional circumstances underlying the introduction of pay-TV and related premium services and, as a result, may have limited and tailored its action to areas in which its jurisdictional and regulatory position seems strongest. Thirdly, ultimate responsibility for directing the introduction of pay-TV in Canada must rest not with the Commission but with government itself, which has thus far failed to articulate any clear policy on how such a new technology should be put into effect. These qualifications notwithstanding, the fundamental question raised is whether important new technologies like pay-TV can be introduced effectively and efficiently by regulation, and if, as it seems, the answer is yes, are there ways and means whereby the delays and difficulties occasioned by the regulatory process can be minimized.

Structured Competition

In its licensing decision, the CRTC has adopted a competitive solution to the problem of how pay-TV should be introduced in Canada, but at the same time a highly structured form of competition. The Commission has clearly rejected the monopoly solution that would see a single agency, public and/or private, licensed to distribute pay-TV across the country and, in so doing, has deviated significantly from the traditional organization of broadcasting in Canada. Likewise, it has also rejected the path of deregulation and an "open skies" situation that would allow for unrestricted competition within the emerging pay-TV industry and lead to the wholesale importation of American pay-TV programming. Instead, it has adopted a kind of structured competition — neither classic competition nor strict regulation — whereby a number of distributors have been licensed to operate and a putative balance of power established within the pay-TV marketplace. In advocating structured competition, the Commission was clearly responding to a resurgence of interest in the free, market, and powerful pressures for regional expression.

This structured competition is designed to operate on different levels and within clear limits. Most prominently, the Commission has mandated direct competition between national, regional, and specialty licensees each operating within a given territorial market. However, by no means is this to be full and free competition based upon conditions of open entry and the unrestricted play of market forces; rather it is to be a strategically regulated form of competition where national objectives and other requirements have been imposed on the successful licensees. With regard to competition in the areas of inputs and product, the Commission has expressed concern that licensed pay-TV operators should not lock up available programming and shut out their competitors and that there will be some differentiation among general interest and more specialized programming offered to subscribers. As well, the Commission has been reasonably careful about matters of cross-ownership and vertical integration, licensing only those without significant linkages to other elements within the broadcasting system and mandating the working out of production and exhibition arrangements on an arm's-length basis. Furthermore, the Commission chose explicitly not to regulate the rates charged to subscribers for pay-TV services nor the rates charged to pay-TV distributors by the cable industry; rather it chose to rely on competitive forces and the desire to maximize market penetration to keep prices down. In the final analysis, however, this calculated attempt at structured competition hinges very much upon the continued exercise by the CRTC of its regulatory powers — establishing the basic rules of the game whereby pay-TV will operate in Canada, creating expectations about how operators should act and imposing restraints on their behaviour when deemed necessary, and ultimately enforcing those rules either through remedial actions or even denial of licence renewal.

There are several potential weaknesses in the form of structured competition adopted by the CRTC. One major cause of concern is the potential impact of competition on the monies generated in support of the domestic programme production industry. While the CRTC has argued that a competitive solution would increase the total revenues generated by the pay-TV system, excessive competition might also be a threat to the financial viability of individual services. If the pay-TV industry proves to be less profitable than anticipated, the actual revenue flow to Canadian producers could be less. Another cause of concern, especially over the long term, is that competition may well encourage the siphoning of programming from conventional broadcasting onto the pay-TV system. This concern is perhaps most acute with regard to the highly attractive area of sports programming that the CRTC virtually ignored in its decision. In addition, it is possible that the form of structured competition adopted by the CRTC may not operate in quite the way it anticipates. If the regional pay-TV services were soon to co-operate in the manner of a network, a possibility encouraged by their non-competitive relationships to one another and the common conception and ownership ties between the Alberta and Ontario services, than a *de facto* network of regional services may well operate in an advantageous competitive position *vis-à-vis* the national service because of the absence of any French-language requirement. Moreover, sharp competition among licensees may well induce a scramble for all the best recent programming and result in a degree of product homogenization that will undercut the Commission's stated goals with regard to diversity and specialized programming. Finally, it should be remembered that the design of a pay-TV system does not take account of important developments in alternative areas like direct satellite broadcasting and video recording, both of which operate outside the realm of structured competition.

Thus, the CRTC has taken a far-reaching and important step in prescribing a form of structured competition for the emerging pay-TV industry. It must be recognized, however, that this is a "hot-house" variety of competition rather than competition in the classic sense of the term and one which is hedged in and put into effect by heavy reliance on regulation. It may well be that the CRTC decision is based upon a misunderstanding of the role and dynamics of competition. One of the fundamental justifications for competition is that it provides an engine for innovation and creativity. However, in the case of pay-TV, competition seems more to have been adopted as a way of justifying and making more palatable the continuation of regulatory control rather than allowing for the free play of market forces. As well, in establishing such an elaborate competitive structure, the Commission, in effect, acquires a vested interest in the economic viability of the emerging pay-TV industry and probably even of the individual licences themselves. Thus, it will be difficult to adhere to a fundamental premise of the competitive system — that firms be allowed to fail as well as to succeed.

A Changing Pattern of Cultural Regulation

As was pointed out previously, the CRTC decision maintains but modifies a pattern of cultural regulation that has been endemic to Canadian broadcasting from its inception. The threat posed by yet another wave of largely American programming and the relative weakness of Canadian production capability has often been given by governments and regulatory authorities as both cause and justification for cultural regulation, and the introduction of pay-TV in Canada continues this pattern. The CRTC decision firmly rejects any wholesale extension of unfettered, free market ideas as far as the content of pay-TV is concerned, and reaffirms the need for measures to ensure the eventual predominance of Canadian programming and to support the domestic production industry. At the same time, however, the decision also adds interesting new features to the overall pattern of cultural regulation that is presently undergoing significant change.

At least four features of the CRTC decision are particularly noteworthy with regard to the pattern of cultural regulation. First of all, it is important to take account of the CRTC's treatment of French-language service as part of the overall pay-TV system and to stress the underlying ambivalence in its position. While the Commission acted deliberately to impose a full French-language requirement on First Choice, at least during the initial years of its operations, it left open the possibility of returning to its original "checkerboard" proposal at some point in the future. Such an eventuality, as the minority opinion points out, would involve adoption of a form of "territorial bilingualism" that would represent an important deviation from established regulatory practice and prevailing government policy. Secondly, the strong emphasis on regional pay-TV services in addition to national services is not only somewhat surprising but also potentially very significant. On the part of the CRTC, it would seem to signal an expansion of the realm of cultural regulation beyond protection against American domination and preservation of linguistic access to a new priority concern for promoting regional programming and production. In this regard, it is interesting to note that the Commission commented favourably on the willingness of the Alberta and Atlantic licensees to invest in programming within their region, whereas in the case of Ontario, it was the willingness to invest outside the province that received favourable comment. Thirdly, the specification of precise production guarantees, expressed both in terms of revenues and expenditures as well as minimum levels of Canadian content, goes some way towards redefining the objective of cultural regulation more broadly as "commitment to Canadian programming." In setting levels of Canadian content relatively low during the first two years but increasing them in subsequent years, the Commission apparently assumed that the initial appeal of pay-TV in Canada will lie primarily in the provision of first-run, largely American, films and special presentations but that inclusion of more Canadian programming can be mandated thereafter. With regard to the generation of funds for Canadian production, however, it is instructive to note that the Commission subsequently issued a "correction" to its decision indicating that revenue and expenditure guarantees could be applied over the five-year term of the licences rather than on an annual basis, but this "correction" was later varied by Cabinet to apply annually. Finally, the Commission's backhanded recognition of the possibility of licensing a universal pay-TV service in addition to discretionary services is an interesting development in terms of cultural regulation. Such a universal service could be operated on a non-profit basis and could be used to generate sizeable, secure, and steady revenues in support of Canadian programming. Whether viewed as an attractive new policy instrument or merely as a threat held over the heads of discretionary licences, this initiative represents yet another indication of a deliberate and changing pattern of cultural regulation.

It is clear that the main thrust of this pattern of cultural regulation is the creation of a stable and healthy domestic programme production industry. After a period of rapid growth during the mid-1970s, the Canadian production industry suffered a serious decline in recent years, and, with the introduction of pay-TV in Canada, the opportunity is being seized to inject new life into an ailing but crucially important industry. The justification for introducing pay-TV in Canada has come to hinge more and more on the stimulus this initiative can give to the domestic programme production industry. Whether the competitive solution adopted by the Commission along with measures of cross-subsidization through a more tightly defined "commitment to Canadian programming" demanded of the pay-TV licensees will on their own bring renewed health to the programme production industry is debatable, especially if broader policy initiatives in its support are not also undertaken. More to the point, however, support for the domestic programme production industry has come to serve ambiguously both as an end in itself and a means of achieving other objectives, and this confusion of ends and means is a classic recipe for ineffective policy making. One must seriously pose the questions whether the success and prosperity of the Canadian programme production industry really constitute an adequate justification for the introduction of pay-TV in Canada or whether there may be other compelling reasons for proceeding with its introduction.

Whatever the merits or demerits of particular features and the likelihood of eventual success or failure, the pattern of cultural regulation adopted by the Commission with regard to pay-TV contains its own logical inconsistencies and delicious ironies. One of the major national applicants that did not originally propose a full French-language service was eventually licensed by the Commission but had a full French-language requirement imposed upon it. It now finds itself in a position of questionable economic viability *vis-à-vis* competing regional services that do not have to meet this requirement. As well, the regional services licensed in Alberta and Ontario and, to a lesser extent, Atlantic Canada have a natural affinity for co-operation among themselves, based in the first instance upon a common conception and roots and more generally upon their non-competitive relationship to one another, and this leads to the possibility that the various regional services could, over time, become virtually another national network. More significantly, there is the uncomfortable reality that only by accepting a large dose of American programming during the early years of pay-TV in Canada can the necessary revenues be generated to underwrite more and better Canadian programming in subsequent years. And finally, by the time that pay-TV eventually is offered to Canadian viewers, ongoing technological developments in areas like satellite dishes and cheap video recordings make the effective cultural regulation less and less feasible. As in the case in many other areas of public policy, however, it is perhaps the Canadian condition to be forced to live with such inconsistencies and ironies.

Notes

[1] Representative of this initial commentary, and respectively of these two lines of argument, are Sandra Gathercole, "How Many Birds Will Fly? The CRTC Pay-TV Decision," *Canadian Forum* (August 1982): 29–32; and Robert Fulford, "Paying the Price," *Saturday Night* (August 1982): 3–6.

[2] This acknowledgement is made in the "minority opinion" expressed by two members of the CRTC, Jean-Louis Gagnon and John Grace, in dissenting from the Commission's decision. See Canadian Radio-television and Telecommunications Commission, "Pay Television," Decision #82-240, 18 March 1982, p. 65.

[3] Canadian Radio-television and Telecommunications Commission, "Call for Applications for Pay Television Service," 21 April 1981, p. 2.

[4] One additional application was originally submitted but subsequently withdrawn.

[5] CRTC, "Pay Television," pp. 8–9.

[6] *Ibid.*, p. 4.

[7] *Ibid.*, p. 10.

[8] *Ibid.*, p. 12. It should be noted, however, that the Commission did not specifically call for applications either from Saskatchewan, where a pay-TV system is already in operation, or from Manitoba.

[9] *Ibid.*, p. 15. These public hearings have now been scheduled by the Commission for late 1982 or early 1983.

[10] *Ibid.*, p. 17.

[11] *Ibid.*, p. 20 and Appendix A. These "classes of licences" are set out in Proposed Pay Television Network Regulations applicable to all licensees.

[12] *Ibid.*, p. 19.

[13] For the Commission's full argument in support of this action, see *ibid.*, pp. 39–41.

[14] Detailed conditions of licence are set out for each of the successful applicants and apply in addition to any network regulations for pay-TV service. In the case of First Choice, see *ibid.*, Appendix C.

[15] *Ibid.*, p. 45.

[16] *Ibid.*, p. 49.

[17] *Ibid.*, p. 53.

[18] *Ibid.*, p. 57 and Appendix G.

[19] *Ibid.*, p. 59 and Appendix H.

[20] *Ibid.*, p. 65.

[21] *Ibid.*, pp. 66–67.

[22] *Ibid.*, pp. 68–69.

[23] *Ibid.*, pp. 70–71.

Glossary

ACTRA	Association of Canadian Television and Radio Artists
BBG	Board of Broadcast Governors
CAB	Canadian Association of Broadcasters
CAC	Consumers' Association of Canada
CATV	Community antenna television
CBC	Canadian Broadcasting Corporation
CBL	Canadian Broadcasting League
CCTA	Canadian Cable Television Association
CFDC	Canadian Film Development Corporation
CPN	Cooperative Programming Network
CPTN	Canadian Première Television Network
CRTC	Canadian Radio-television and Telecommunications Commission
CRTC	Conseil de la radiodiffusion et des télécommunications canadiennes
DBS	Direct broadcasting satellite
FCC	Federal Communications Commission (United States)
HBO	Home Box Office
IPC	Independent Producers Committee for Pay-Television
JAC	Joint Action Committee on Pay-TV and Satellite Policy
LAMB	Lively Arts Market Builders
MATV	Master antenna television
MDS	Multi-point distribution system
NFB	National Film Board
PBS	Public Broadcast System
PTN	Pay Television Network
STV	Subscription television
TVRO	Television receive-only
UHF	Ultra-high frequency
VHF	Very high frequency

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